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AN OUTLINE

OF

THE LAW OF LIBEL

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SIX LECTURES

DELIVERED IN THE MIDDLE TEMPLE HALL
DURING MICHAELMAS TERM, 1896

BY

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CRIMINAL LAW

I

LIBEL

I HAVE been asked by the Council of Legal Education to deliver six lectures on the Law of Libel. It was originally proposed that I should include the law of slander, but I felt that it would be impossible, in a course of six lectures, to deal satisfactorily with more than the law of libel. We have accordingly nothing to do to-night with the law of slander, except merely to distinguish slander from libel. A slander, as you know, is spoken defamation; a libel is written or printed defamation. Or a libel may take the form of an effigy or a picture; it must be something permanent in its character, not fleeting like spoken words. You will remember the action which Mr. Monson brought against Madame Tussauds, Limited, for a wax-work figure, which was

undoubtedly a good likeness of him, but which acquired a defamatory meaning from the situation in which the defendants thought fit to place it. So, too, a caricature in *Vanity Fair* may be a libel, though it generally is not. This, then, is the chief distinction between libel and slander: that a slander is merely spoken, a libel is written or printed or otherwise permanently recorded.

There is another distinction, which I must mention in passing, though I shall deal with it more in detail in my sixth lecture. To write and publish a libel on a private individual is a crime as well as an actionable wrong; but to slander a private individual is no crime at all.

A third distinction is the one which concerns us most to-night. In many cases words will be actionable if written or printed and published, which would not be actionable if merely spoken. Any words which injure the reputation of the plaintiff are libellous, when written. But if the words be merely spoken, the plaintiff has to prove a great deal more before he can recover damages. He must satisfy the jury that the words impute that he has committed a crime, or that he is suffer-

ing from a contagious disorder, or that they disparage him in the way of his office, profession, or trade; or, if the plaintiff be a woman or girl, that the words impute to her adultery or unchastity. In all other cases, the plaintiff must prove what is called special damage; that is, that he has sustained some pecuniary loss as a direct consequence of the defendant's uttering the words. Now, in an action of libel it is never necessary to prove special damage. Of course, if pecuniary loss has been caused to the plaintiff by the publication of the libel, he will prove this fact to increase his damages; but it is not necessary for a plaintiff in an action of libel to show any such pecuniary loss; he can recover damages without it.

You will at once ask, Why is this? That is a very proper question for a student of our law to ask. He should always try to get at the reasons for everything. Whether he will succeed in discovering them to his satisfaction is another matter! Now, there are two good reasons and one bad one which are generally given for this distinction between libel and slander:—

1. A slander may be uttered in the heat of

the moment, and under a sudden provocation; the reduction of the charge into writing and its subsequent publication in a permanent form show greater deliberation and raise a suggestion of malice.

2. The written or printed matter is permanent, and no one can tell into whose hands it may come. Every one now can read. The circulation of a newspaper is enormous, especially if it be known to contain libellous matter; and many people implicitly believe every word which they see in print merely because it is in print. And even a private letter may turn up in after-years, and reach persons for whom it was never intended, and so do incalculable mischief. Whereas a slander only reaches the immediate bystanders, who can observe the manner and note the tone of the speaker,—who have heard the rest of the conversation which may greatly qualify his assertion,—who probably are acquainted with the speaker, and know what weight is to be attached to any charge made by him; the publicity is thus much less in extent, and the mischief less durable.

3. Those are the two good reasons. Another reason often assigned is that a libel conduces

to a breach of the peace and that a slander does not. But I doubt that. I think you are just as likely to cause a breach of the peace if you abuse a man to his face by spoken words, as if you wrote him a letter expressing your sentiments with equal force. That is what I have ventured to call a bad reason.

But some of you look as if you were anxious to let me know that you are not convinced by what I have called the two good reasons, any more than by the bad one. "They may be very good reasons," you would like to say, "why a plaintiff should recover a smaller amount of damages in an action of slander than in an action of libel for the same words; but they do not appear to me to go to the root of the matter, or to be any satisfactory explanation for your statement that certain words if written are actionable, whereas the same words if merely spoken are not. The considerations which you have been urging do not go to the cause of action, but only to the amount of damage done. If the plaintiff's reputation has in fact been injured by the spoken words, he ought to be allowed to recover some damages, although it may be

true that, had the words been written, he would have been entitled to more."

Well, that is, I confess, a very sensible argument, and it is no original idea of yours. It is exactly the argument which that eminent lawyer, Mr. Barnewall, addressed to the Court of Error in 1812 in the case of *Thorley* v. *Lord Kerry*, 4 Taunton, 355. But the Court replied that he was even then too late to raise the point. Sir James Mansfield, L.C.J., felt the weight of Mr. Barnewall's arguments, and was almost persuaded to repudiate the distinction between written and spoken scandal; but he found on looking into the authorities that that distinction had been established by some of the greatest judges known to our law: by Hale, C.B., in 1678, by Lord Holt, C.J., in 1694, and by Lord Hardwicke, C.J., in 1737. And so the full Court decided that they could not in opposition to these old cases "venture to lay down at this day that no action can be maintained for any words written, for which an action could not be maintained if they were spoken." And if it was too late to disturb this well-recognised distinction in 1812, *a fortiori* it is too late to attempt to shake it in 1896. It is clear

law, then, that an action of libel will lie for many words which are not actionable if merely spoken. You may call a man a liar or a coward or a libertine with impunity, but be careful not to write him down an ass!

For after all there is a solid distinction between a spoken slander and a printed libel. Take, for instance, the case of *Cook* v. *Ward*, which was decided in 1830 (6 Bing. 409). There the plaintiff had himself told a party of friends a humorous story against himself, how he had once been mistaken for Jack Ketch at an inn in Bury St. Edmunds during the Assizes. Thereupon the defendant meanly published the story in his newspaper for all the world to read, adding some embellishments of his own; and the plaintiff was in consequence pointed at and called "Jack Ketch" at a meeting of the burgesses of Colchester, in which ancient borough he served the important office of assistant overseer. He sued the proprietor of the paper for libel, and it was urged that he ought not to recover any damages because he had told substantially the same story himself. But the judges would not listen to this argument. Tindal, C.J., laid especial stress on the fact that "there is

a great difference between a man's telling a ludicrous story of himself to a circle of his own acquaintance, and a publication of it to all the world through the medium of a newspaper." And see *Dolby* v. *Newnes*, 3 Times L.R. 393.

A libel, then, must be written or printed or otherwise permanently recorded. It may be written on paper, parchment, copper, wood, or anything else. It may be written with pen and ink, or black lead pencil, or in chalk, or colours. A statue or a picture may be a libel, and so may any other mark or sign exposed to public view and conveying a defamatory meaning. A chalk mark on a wall may be a libel on the plaintiff; and because the wall cannot be conveniently brought into court, it has been solemnly decided that secondary evidence may be given of the words which were chalked on it. Burning a man in effigy, or fixing up a gallows or other reproachful or ignominious sign against his front-door, may be a libel on him. This is law as ancient as 1598; see Lord Coke *De famosis libellis*, 5 Rep. 125, *b*.

Next, the words which are so written or printed or otherwise permanently recorded

must be *defamatory:* that is, they must have injured the reputation of some one, must have made people think worse of him. I do not know that I can give you a better definition of a libel than that. If you have published words about me which have made people think worse of me, then you have injured my reputation, and your words are libellous.

And since I cannot give you a better definition, let us take one or two instances. Is it a libel to write and publish of a man that he is a Roman Catholic? In these days, certainly not. Many of the best and noblest of mankind have belonged to that ancient Church, and the fact that a few ultra-Protestants might think the worse of a man for being a Roman Catholic shall make no difference. But I doubt if a Dublin jury would have taken this view of the matter in the last century. And in England, so long as the penal statutes against Papists were in force, the words would undoubtedly have been actionable. Then, again, surrounding circumstances may alter the case. Suppose a candidate for Parliament, in answer to a question put to him at an election meeting, had stated that he was a Protestant; then for the opposition

newspaper to print and publish that he really was a Roman Catholic, would be a libel on him: for this would amount to saying that he was a hypocrite and a liar.

Again, it is not libellous in England to describe the plaintiff in writing as "Man Friday" to some one else. "Man Friday," as Lord Denman remarked, "was a very respectable man." But such words would be actionable in the United States. They are not so fond of black men in America as we are here.

Take another instance. Lord William Nevill was for some time agent for an insurance company; but he resigned his agency because he was not satisfied with the terms offered him by the company. Thereupon the secretary of the company sent out a circular to all the policyholders who had been introduced by the plaintiff, giving them the address of the company's new west-end office, and adding, what was not true, that the agency of Lord William Nevill had been closed by the directors. The plaintiff alleged that these words would be taken to mean that he had been dismissed by the directors from his employment as their agent for some reason discreditable to him, and that the words were therefore a libel

on him. The jury found that the circular was a libel, and assessed the damages at £100, and Baron Pollock gave judgment for the plaintiff for that amount. The Court of Appeal was very doubtful about the matter; but there was the verdict, and they did not like to upset it. The Master of the Rolls said, "It seems to me that the terms of that circular come as nearly as possible to being incapable of a defamatory meaning." But "it would be for the jury to say whether it was a libel or not. I am unable to say that the finding of the jury on that question was wrong" (*Nevill* v. *Fine Arts and General Insurance Company, Limited*, 1895, 2 Q.B. at p. 168). But now the House of Lords has taken the bull by the horns, and declared that the circular was not a libel, and could not be construed into a libel, and that the plaintiff ought to have been non-suited at the trial on the ground that he had no case to go to the jury (13 Times L.R. 97).

So you see it is not always easy to say beforehand whether a particular paragraph or circular is a libel or not. Unless the words are clearly incapable of any defamatory meaning, the judge at the trial will not stop the case. He will explain to the jury the law as

to what libel is; he may, if he thinks fit, tell them his own opinion of the words before them; and then he will leave it to the jury, as men of common sense, to say whether the words are a libel or not. And the jury as a rule decides that question rightly.

To be libellous, then, the words must have injured the reputation of some *person*, and that person must be the plaintiff. The plaintiff cannot sue for words which are defamatory of some one else. And an attack on a *thing* is not a libel on the individual who owns that thing. To illustrate this distinction let me refer you to a recent Australian case, which aroused considerable attention in the newspaper world (*Australian Newspaper Company, Limited* v. *Bennett*, 1894, A.C. 284). The circumstances which gave rise to the action were curious.

A sculling race between two professional oarsmen, Kemp and M'Lean, was rowed on the Parramatta River, in New South Wales, on the afternoon of Thursday the 15th of May 1890, resulting in a victory for Kemp. On the same afternoon an account of the race was published in two editions of the *Evening News*, a newspaper published in Market Street,

Sydney. The greater number of the copies printed of both editions contained the correct statement that Kemp had won. But unfortunately in some 1250 copies of the later edition M'Lean was announced in large type as the winner, and this announcement was followed by a paragraph headed "Details," from which it appeared that, on the contrary, Kemp had won the race. There was also some evidence to prove that, in a few of the copies of the earlier edition of the *Evening News* published the same afternoon, the announcement was made in large type that M'Lean had won the race, and that in these papers there were no "Details" published from which the truth could be ascertained. The error in the incorrect copies arose from their being inadvertently struck off from a plate, which had been prepared before the race was rowed, to meet the possible case of M'Lean winning the race.

Thereupon the *Australian Star*, a rival Sydney newspaper, published an article "chaffing" their contemporary on this "fearful blunder." They referred to

"The terrible bungle made by the *Evening News*. First, it triumphantly told a wondering public, who

had previously absorbed the correct result from the *Star*, that M'Lean had got home first. Then it doubled back in a following edition, and told a wondering world in effect that the preceding edition was an unmitigated perversion of the truth, and that both Kemp and M'Lean had come out on top."

And in another part of the paper appeared these words :—

"It is, to say the very least of it, rather rough on M'Lean, after having won the boat-race in Market Street, to be adjudged the loser everywhere else. According to the Market Street evening Ananias, both Kemp and M'Lean won the boat-race yesterday. Poor little silly Noozy!"

Thereupon Mr. Bennett, the proprietor of the *Evening News*, brought an action of libel, urging that the word "Ananias" necessarily involved deliberate lying, and imputed personal dishonesty to himself. But the Judicial Committee of the Privy Council held that this was not so, and upheld the verdict of the jury that there was no libel. For in this case it was clear from the context that the comment dealt solely with the production, not the man. No newspaper proprietor could intentionally desire to perpetrate such a mistake as had been made in the plaintiff's paper; the word "Ananias" was applied to the newspaper, not

to the plaintiff, and, though in bad taste, it did not in that context amount to a libel.

Hence you may take it as a general proposition of law that words which merely depreciate some *thing*, or impugn the plaintiff's *title* to some property, are not defamatory in the strict sense of that term. They may in certain events give rise to an action, but not to an action of libel proper. Actions for such words are governed by different rules from an action of the kind I am dealing with to-night —an action for words defamatory of a *person*. You will find the law relating to those other actions under such headings as "Slander of Title" and "Trade-Libel."

"Slander of Title" is the term usually employed to include all statements, whether written or spoken, which impeach a man's title to any property, real or personal. Such words clearly do not affect his reputation. You would, I hope, think just as highly of me, whether I owned Blackacre or not.

A "Trade-Libel" is a statement, whether written or verbal, which does not attack a man's moral character, or question his solvency, or in any way affect his private or professional reputation, but which has in fact injured his

business and caused him pecuniary loss in the way of his trade. Such statements may either disparage the quality of the goods which the plaintiff sells, or assert that they are not the goods which he represents them to be, or that they are an infringement of somebody's patent or copyright. So, too, words urging or warning people not to deal with the plaintiff, or not to pay him money due to him, or to bring actions against him—any words, in short, which, though not personally defamatory, are yet clearly calculated to injure the plaintiff in his trade—will be actionable if the plaintiff can prove that they are false, that they were published "without lawful occasion," and that damage has in fact resulted to him from their publication. You will find a very recent instance of this kind of action in the Law Reports of 1892. I refer to the case of *Ratcliffe and Sons* v. *Evans*, 1892, 2 Q.B. 524. There the defendant, who either knew or ought to have known the contrary, published in his newspaper that the plaintiffs had ceased to carry on business as engineers and boiler-makers, and that the firm of Ratcliffe and Sons had ceased to exist. This was no libel in the ordinary sense of the word. It was rather to

the credit of the Messrs. Ratcliffe that they had been so successful in their business that they could now afford to retire on a handsome competency. But the paragraph was untrue, and the publication of it did great injury to the business of that firm. Messrs. Ratcliffe and Sons therefore recovered damages.

Then there is another whole category of words which are not really defamatory at all, which do not injure the personal reputation of anybody, or disparage the goods which he sells, or impeach his title to any property, and yet if they be uttered with deliberate malice by one who knows that their utterance will undoubtedly cause loss to the plaintiff, then, if such loss does in fact follow from their utterance, an action will lie against the defendant for maliciously doing the plaintiff an injury. But that is not an action of libel at all. It is what is called "an action on the case." Let me give you one or two instances to make my meaning clear. Suppose there are only two grocers in the town of Eatanswill, and one of them maliciously spreads a false report that the children of the other grocer, who live over the shop, have the scarlet fever. The reputation of the poor children is not injured,

The goods which the father sells are not disparaged, nor is his title to them impugned. But it is quite clear that the spreading of this malicious invention will do incalculable damage to the trade of the unhappy father, and therefore an action lies. You will find authority for this proposition in the judgment of Kelly, C.B., in *Riding* v. *Smith*, 1 Ex. D. at p. 96. Take another instance: in the case of *Kelly* v. *Partington*, which you will find in the fifth volume of Barnewall and Adolphus' Reports, the Solicitor-General, Sir John Campbell, contended that if praise produced special damage, such praise was actionable; and Littledale, J., put him a case (p. 648)—"Suppose a man had a relation of a penurious disposition, and a third person, knowing that it would injure him in the opinion of that relation, tells the latter a generous act which the first had done, by which he induces the relation not to leave him money, would that be actionable?" And Sir John Campbell answers—"If the words were spoken falsely with intent to injure, they would be actionable." And clearly he was right.

There is another reason why you must carefully distinguish cases of malicious injury to a man's business from cases of personal libel;

and that is this: the cause of action for an injury to a man's reputation dies with him, whereas an action for trade-libel survives to his executors. They can recover damages for the injury done to the business, because the value of the estate which comes into their hands has been to that extent diminished. This distinction is clearly pointed out in a recent case of *Hatchard* v. *Mege and others*, 1887, 18 Q.B.D. 771. There the defendants inserted in the newspapers a paragraph to the following effect:

"CAUTION

"DELMONICO CHAMPAGNE

"Messrs. Delbeck & Co., finding that wine stated to be Delmonico Champagne is being advertised for sale in Great Britain, hereby give notice that such wine cannot be the wine it is represented to be, as no champagne shipped under that name can be genuine unless it has their names on their labels. Messrs. Delbeck & Co. further give notice that if such wine be shipped from France they will take proceedings to stop such shipments, and such other proceedings in England as they may be advised."

Now, which was this? Was there any reflection on the character of Mr. Hatchard, who was advertising Delmonico Champagne for

sale, or was it simply a denial of his right to use the name "Delmonico Champagne" on his labels? Mr. Hatchard brought his action, and after the pleadings were closed he died, and his executors carried on the proceedings. Now if the words were merely a personal imputation upon Mr. Hatchard, the action died with him. But if they were an attack on his right to use a label, that survived to his executors. Which do you think it was? I see some of you think it was a personal libel on Mr. Hatchard; others of you think that it was merely an attack on his labels. Well, you are both right. The Court decided that the first sentence in the paragraph, which asserted that the plaintiff's wine was not the wine which he represented it to be, was a personal charge against Mr. Hatchard of misrepresentation, and all claim for damages for those words died with him. The rest of the paragraph was a trade-libel, and for those words the action could be continued by the executors. Lord Coleridge had non-suited the executors at the trial on the ground that the action came to an end on the death of the original plaintiff; but the Divisional Court granted a new trial. The executors accordingly went on with the action, and

eventually failed to recover any damages at all; because the jury were satisfied that there was no malice on the part of the defendants; they had merely published that advertisement to protect what they honestly believed to be their rights. See the report of the second trial in the fourth volume of the Times Law Reports at page 118.

For in all these cases of slander of title, trade-libel, and actions on the case for malicious injury, the plaintiff must prove (*a*) that the words are false; (*b*) that they were published maliciously;[1] (*c*) that they have caused him special damage; otherwise he can obtain neither damages nor an injunction (*White* v. *Mellin*, 1895, A.C. 154). But in an ordinary action of libel, when the words are defamatory of some individual, he need prove none of these things; except that in one case—when the words were published on a privileged occasion—he must prove malice, as I shall explain hereafter. Whether the words be privileged

[1] In the case of an action brought against a patentee for "threats" under Sec. 32 of the Patents, Designs, and Trade Marks Act, 1883 (46 and 47 Vict. c. 57), the plaintiff need not prove malice. But this, though often classed with actions for trade-libel, is really a new statutory action *sui generis*, with a practice and procedure of its own.

or not, he need never prove any special damage, so long as the words are defamatory. Nor need he prove that they are false: it is for the defendant to prove that they are true, if he can.

And now I must call you back from these miscellaneous actions, and ask you to confine your attention to actions of libel proper, the gist of which, as I have already told you, is the injury to the reputation of some person. The other actions to which I have been referring, though akin to actions of libel, are not strictly actions of libel at all, because in them the reputation of no person is injured. You may ask what I mean by a person. Is a corporation a person? Well, it is, and it is not. It is a limited kind of person. Can a corporation sue, if its reputation is injured? That depends on a previous question, Has it a reputation that can be injured? Only in a restricted sense. A corporation is not allowed to possess a reputation for any mere abstract virtue. It is not like an individual, who can sue for words which impugn his honour or impute that he lacks generosity, common sense, or good taste. If a season-ticket holder abuses a railway company for treating him

shabbily, probably no action would lie. But it might be a different matter if he accused the company of habitual, though unintentional, unpunctuality. No one would think the worse of them morally for that, but it would tend to reduce the number of season-ticket holders. It is very doubtful whether a corporation can sue for words which merely affect its dignity or honour. In the case of the *Mayor and Corporation of Manchester* v. *Williams*, 1891, 1 Q.B. 94, it was doubted whether a corporation could have any reputation apart from its property or trade. But a corporation can undoubtedly sue for any words which affect its property, or injure its trade or business (*South Hetton Coal Company, Limited* v. *North-Eastern News Association, Limited*, 1894, 1 Q.B. 133). It cannot bring an action in respect of any words which impute to it conduct of which a corporation physically cannot be guilty—such as murder or corruption (*Metropolitan Omnibus Company* v. *Hawkins*, 1859, 4 H. & N. at p. 90). Nor can it sue for any words which are a libel or a slander, not on it, but on its members individually—unless, indeed, special damage has thereby been caused to the corporation.

And now let us assume that the plaintiff has satisfied the jury that the words are libellous, that is, he has shown that they were written or printed, or recorded in some more or less permanent form by the defendant, and that they were such words as would injure the reputation of the plaintiff. Still, to succeed in an action of libel, the plaintiff must prove something more. He must prove *publication.* He must prove a publication by the defendant —a publication in fact, and not merely in intention. He cannot recover damages for what might have happened, but did not; because in that event no injury has been done to his reputation. Merely composing a libel is not actionable. Merely writing a libel is not actionable, unless it be subsequently published. And no cause of action arises if the words are only communicated to the person libelled; for that does not injure his reputation, though it may wound his self-esteem. A man's reputation is the estimate in which others hold him, not the good opinion which he has of himself. It may be that the defendant desired and intended, and did all in his power to publish, words defamatory of the plaintiff, yet if they never reach the eye of

any one except the plaintiff, no action lies. To be actionable, the defamatory words must be published by the defendant to some person other than the plaintiff.

I will give you a few examples to illustrate this rule, that the plaintiff must show a publication to a third person.

The defendant wrote a letter to the plaintiff and sent it to him by post direct. But before he posted it a friend dropped in, and the defendant could not resist the opportunity of letting his friend know what a smart letter he had just written to the plaintiff. So he read the letter to him. That was clearly a publication to the friend.

Or, suppose before posting it direct to the plaintiff, he gave it to a clerk to copy, that again is a publication by the defendant to his own clerk.

The managing director of the defendant company dictated a letter, containing words defamatory of the plaintiff, to a shorthand clerk, who transcribed it by a type-writing machine. The type-written letter was then signed by the managing director, press-copied by the office boy, placed in an envelope, and sent direct to the plaintiff's office. This was

held by the Court of Appeal to be a publication both to the type-writer and to the office boy (*Pullman* v. *Hill and Company*, 1891, 1 Q.B. 524).

The defendant wrote libellous words on a post-card, which he addressed to the plaintiff, and posted. The words were read by the postman and by the plaintiff's housemaid who took his letters in. Perhaps the defendant never intended them to read what he wrote. Still this is undoubtedly a publication by him to them. He should not have used a post-card. In practice, whenever the defendant uses a post-card, the plaintiff is not expected to prove that there has in fact been a publication; it is for the defendant to prove that there has not.

So if the defendant sends a message by telegram instead of in an envelope properly fastened up, this is clearly a publication by the defendant to at least two telegraph clerks.

The defendant wrote a letter and gave it to B to deliver to the plaintiff. It was folded, but not sealed, so B could have read it if he had thought fit. B did not read it, but conveyed it direct to the plaintiff. This is no publication.

The defendant threw a sealed letter addressed to the plaintiff, "or C," into M's enclosure. M picked it up and delivered it unopened to the plaintiff himself, who alone was libelled. No publication, for neither C nor M read the letter.

Posting up a libellous placard and taking it down again before any one could read it, is no publication. If, however, it was exhibited long enough for any one to read it, then the defendant must satisfy the jury that no one actually did read it.

Now, what about a publication to a man's wife? Is she sufficiently a third person to satisfy this rule? There is, as you know, an old rule of law that a husband and his wife are one; and this is still law for many purposes, in spite of all the Married Women's Property Acts. Thus, a husband is still liable to pay damages for a libel published by his wife, even though she published it without his knowledge or consent. But it does not follow that you may publish a libel on A to A's wife with impunity. That would never do. Mrs. A is the last person in the world to whom Mr. A would wish such a communication to be made. Hence it has been held that an action

lies if the defendant publishes a libel on the plaintiff to the plaintiff's wife (*Wenman* v. *Ash*, 13 C.B. 836). On the other hand, the law flings its protecting ægis over all conversations and communications between husband and wife. They may criticise the conduct of their friends and neighbours to their heart's content, so long as no one else shares their confidences. Such an interchange of opinion is not in law a publication at all (*Wennhak* v. *Morgan*, 20 Q.B.D. 635). I confess I should have thought it was a publication, but a privileged one. The Divisional Court, however, knows better, and it decided that no action lies for a libel written by a husband and published by him only to his wife.

I told you just now that although the defendant may have desired and intended, and may have done all in his power, to procure a publication of defamatory words, still no action lies if they never reach the eyes of any one except the plaintiff himself. Now take the converse case. Suppose it is clearly proved that the defendant never desired or intended that his words should be published to any third person, and yet somehow they are

published, will an action lie? Yes; if such publication occurred through any act or fault of the defendant, he will be liable. If by his conduct he has in fact injured the plaintiff's reputation, though inadvertently, he must pay damages. The absence of any wicked intent may diminish the amount of such damages, but it does not affect the plaintiff's cause of action. If you accidentally or unintentionally publish to a third person words defamatory of me, I shall succeed in an action against you, unless you can satisfy the jury that you were guilty of no negligence, and were not at all to blame in the matter.

Suppose the defendant wrote two letters, one to A and one to B, and the letter to A was an angry and libellous letter. The defendant meant to send A's letter direct to A, but he unfortunately put it into the envelope which he had addressed to B, and sent to B the letter which he had intended for A. Is this a publication by the defendant to B of a libel on A? Clearly it is, for it was through the negligence of the defendant that the libel was published to B.

If I write a libel and leave it about on the top of the desk in my study, so that it will

catch the eye of any chance visitor; and a visitor is shown into the room in my absence, and he sees the libel there and reads it, that would, I think, be a publication of the libel by me to that visitor. I am to blame for leaving such a document about.

The sale of every written or printed copy of a libel is *prima facie* an actionable publication. But if the defendant is a newsvendor, who neither wrote nor printed the libel but merely sold the newspaper containing it in the ordinary way of his business, and who neither knew nor ought to have known that that newspaper did contain, or was likely to contain, any libellous matter, he will not be deemed to have published the libel which he thus innocently disseminated (*Emmens* v. *Pottle*, 1885, 16 Q.B.D. 354).

If the defendant wrote a libellous letter and placed it in an envelope properly addressed to the person libelled, and fastened it down and sent it to him by a messenger; if that messenger wrongfully broke open the envelope and read the libel, that would be no publication by the defendant to the messenger. For the only publication there was solely caused by the wrongful act of the messenger,

and the defendant was guilty of no negligence in the matter.

But suppose the defendant, after he wrote the letter, put it in an envelope, and addressed that envelope to the plaintiff, but did not fasten it down, and then gave it to a clerk to convey to the plaintiff. Suppose the wicked clerk on the road, finding that the envelope was not gummed down, took the letter out and read it, would that be a publication by the defendant to his clerk?

Well, I think it would be. Of course the clerk is to blame for reading a private letter. But is not the defendant still more to blame for not properly fastening up the letter? I think that is a publication by the defendant to his clerk.

Of course the defendant is only liable for his own acts and those of his servants or agents. He will not be responsible for any publication which is caused solely by the independent act of some third person. But if the defendant had any share in the matter, or by any act or conduct contributed to cause the publication, he will be liable. Take the case suggested by Lord Esher in *Pullman* v. *Hill and Company*, 1891, 1 Q.B. at p. 527:

"If the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk and takes away the letter and makes its contents known, I should say that would not be a publication" by the writer.

I had a case about three years ago, which illustrates the same principle. The circumstances were unusual. The defendant had made up his mind to murder A and then to shoot himself; he wrote a libellous paper, stating his reasons for committing the crime, which he hoped would be found on his dead body and published to all the world. He shot at A and wounded him, but was arrested before he could shoot himself. He was taken to the police-station and searched, and the paper was found on him by a sergeant of police, who subsequently read it aloud at the trial to prove that the crime was committed deliberately. It was copied into many newspapers. Mathew, J., expressed the opinion that there was no publication by the defendant; the sergeant was not his agent.

In an American case the plaintiff, after receiving a libellous letter from the defendant, properly addressed to himself and properly sealed, sent for a friend of his and also for the

defendant; he then, in their presence, repeated the contents of the letter, and asked the defendant if he wrote that letter; the defendant, in the presence of the plaintiff's friend, admitted that he had written it. It was held that this was no publication by the defendant to the plaintiff's friend. It was the plaintiff's own act.

And this suggests to me a case of greater difficulty. Suppose that the defendant is a German merchant, and that the plaintiff is a German too, a clerk in the office of an English merchant. The defendant considers that he has some cause of complaint against the plaintiff, so he writes a letter in German to the employer of the plaintiff. The envelope is properly fastened down and addressed to the English merchant, who opens it himself; he sees that it is in German, so he calls for his German clerk, the plaintiff, and hands it to him, saying, "Tell me what this is about." Thereupon it becomes the duty of the plaintiff to translate this German letter to his employer, and in so doing he, the plaintiff, necessarily publishes to his employer a libel on himself. Can it be said that this is a publication by the defendant? Can the plaintiff

be the agent of the defendant to create a cause of action against his principal? Here you see the defendant has acted in such a way as to make it the duty of the plaintiff to publish this libel to the English merchant. He did, in fact, compel the plaintiff to injure his own reputation, and it seems hard therefore that he should escape liability. On the other hand, it is difficult to hold in any case that the plaintiff can be the agent of the defendant to create for himself a cause of action against his principal. The case is on the border line; and when it arises I shall be happy to argue it in the Court of Appeal on either side.

But in the meantime the general principle is clear, that in order to succeed in an action of libel the plaintiff must prove an actual publication by the defendant to some third person of written or printed words which have injured the reputation of the plaintiff. As soon as the plaintiff proves that, he has established a *prima facie* case.

II

FAIR COMMENT ON A MATTER OF PUBLIC INTEREST

In my last lecture I dealt with the plaintiff's *prima facie* case. We agreed that the plaintiff would establish a cause of action, if he satisfied the jury that the defendant had published to some person other than himself written or printed words which had injured his reputation. It is the right of the plaintiff, and of every citizen, to have his good name maintained unimpaired. And this right is what is called by academical professors (who love a tag of Latin) a *jus in rem*. They mean by this phrase, a right absolute, good against all the world, a right which no one may infringe without rendering himself liable to an action. The plaintiff in such an action need prove neither damage nor malice;[1] for no man may dis-

[1] See *post*, p. 110.

parage or destroy the reputation of another; to do so without more is an actionable tort.

But, on the other hand, the defendant has his rights too. He is an English citizen as much as the plaintiff. And one of his rights as an English citizen is to speak his mind fully and freely on all matters which concern the State, or which concern himself as a citizen of the State. In this free country every citizen has a right publicly to discuss all matters of public interest, to canvass any grievance, and to criticise, even with severity, the public acts of any public man. And in exercising this right it will go hard if he do not say something derogatory to the reputation of those whose public conduct he criticises or attacks.

So here you have a conflict of rights. The plaintiff's reputation must not be injured; the defendant's freedom of speech must not be restricted. Which is to yield to the other, if their rights must necessarily clash?

The plaintiff must give way. For he it is that complains and calls in the aid of the law; and he must show good ground for the interference of the State. His bringing an action means that he is seeking compensation for an

injury done to him by an alleged wrongful act of the defendant. If the act of which he complains is not wrongful but legitimate, he shall recover no damages. In other words, a fair comment on a matter of public interest is not an actionable libel at all.

But, on the other hand, the law guards jealously the reputation of every one—even of a politician; and whenever your act, though lawful, is likely to injure your neighbour, you must be very careful that it does him as little injury as possible. If indeed you can exercise your right without injuring him at all, then you must not injure him at all. Hence, if a defendant, when exercising his undoubted right to criticise and comment on the public acts of a public man, should overstep the line and unnecessarily impute dishonourable motives, or maliciously pry into his private concerns, the law is keen to resent this as a malicious libel masquerading in the guise of a fair comment.

The right of criticism or fair comment, then, is zealously guarded; and the defendant will only be relieved from liability so long as he carefully keeps within proper bounds.

In some of the reported decisions of our Courts, the fact that the words complained of

were a fair comment on a matter of public interest has been treated as though it created what is technically known as a privileged occasion. There are certain occasions on which it becomes a man's duty to speak out his mind fully and freely, and to state whatever he honestly believes to be the truth. This is so, for instance, if he is a witness in the box, sworn to tell the truth, the whole truth, and nothing but the truth. Or take the ordinary case of a master who is asked to give a character to his former servant; when that happens, it is the duty of the former master to state what he knows about that servant for the benefit of the person who is applying for his character; and if he states no more than he honestly believes to be true, he will not be liable to an action, even though what he writes should ultimately prove to be untrue. This is because the occasion is privileged. But quite a different rule prevails when the defence of "fair comment" is pleaded. The writer may honestly believe that every word which he has written is perfectly true; but that is quite immaterial, if the jury should deem his comments unfair. This was most clearly laid down in the case of *Campbell* v.

Spottiswoode, 1863, 3 B. & S. 769; 32 L.J. Q.B. 185, an action brought by the Rev. Dr. Campbell against the *Saturday Review* for an article written in what is known as "the *Saturday's* good old style."

Dr. Campbell was the editor of a newspaper called the *British Ensign*, a religious paper, in which he strenuously advocated the necessity of England taking more active measures to convert the Chinese to Christianity. Many worthy people who subscribed to this paper took large numbers of extra copies for distribution, and Dr. Campbell not unnaturally published the names and addresses of the subscribers who thus so generously supported him. But in the number of the *Saturday Review* for 14th June 1862 there appeared an article, and a very cleverly written article, headed "The Heathen's Best Friend." You will find it set out in full in the Reports; but I will give you a few extracts:

"Among the many blessings that we have to be thankful for in this life, that highly refreshing and invigorating newspaper, the *British Ensign*, ought not to be lost sight of. People don't value it so highly as they ought to do, nor are they yet fully aware of the inestimable advantages it has been the means of conferring on mankind. It has, according to Dr.

Campbell (than whom no man should be better qualified to judge), half rooted out infidelity from the land. It has struck a deadly blow at the Papacy. It has awakened the Churches, stirred up the backsliders, reproved vice in high places, comforted Christians in all parts of the world, and made the common enemy of mankind quake with apprehension, and all at the exceedingly low charge of one penny! It seems an excess of generosity to set so low a price on so invaluable an instrument; but Dr. Campbell assures us that he does not look for his reward in the *British Ensign* office, or anywhere there adjacent. . . . To enjoy the *Ensign* one must be brought up to it. One must be trained to browse on the evergreen pastures which stretch before us in that Elysium. Few have had the benefit of such an education. . . . Fortunately, when he (Dr. Campbell) is in a dilemma, a Mr. Thompson, of Bath, is ever at hand to help him out.

"The Doctor refers frequently to Mr. Thompson as his authority—so frequently, that we must own to having had a transitory suspicion that Mr. T. was nothing more than another Mrs. Harris, and to believe, with Mrs. Gamp's acquaintance, that 'there never was no such person.' But as Mr. Thompson's name is down for 5000 copies of the *Ensign*, we must accept his identity as fully proved, and we hope the publisher of the *Ensign* is equally satisfied on the point.

"To buy up the *Ensign* is represented as a Christian duty. Subscribe to the paper, not because it is worth anything, but from love to the heathen.

"There have been many dodges tried to make a losing paper 'go,' but it remained for a leader in the Nonconformist body to represent the weekly subscription as an act of religious duty."

Now this is all very amusing, but it is probably all untrue. Certainly the insinuation about Mr. Thompson is quite unfounded. I had the honour of knowing that worthy gentleman when I was a boy at Bath, and he was just the sort of person who would subscribe for a thousand copies of any paper of an evangelical type, if he thought that any good would result to the Chinese or any one else. At the trial the jury was satisfied that the strictures on Dr. Campbell were undeserved, and found a verdict for the plaintiff for £50 damages. But they added an express rider to their verdict to this effect: That the writer of the article in the *Saturday Review* did believe the imputations in it to be well founded. The Court held this finding to be immaterial. The words exceeded the limits of a fair comment, and whether the writer believed them or not did not matter, except in reduction of damages. The words were libellous, and the plaintiff recovered his £50. It follows from this decision that the *bona fides* of the writer is immaterial whenever the comment is unfair. And it has now been expressly decided in the case of *Merivale and Wife* v. *Carson*, which I will deal with presently, that a fair

comment on a matter of public interest is no libel at all.

There is another and perhaps a clearer reason why a fair comment does not create a privileged occasion. The right to comment upon the public acts of public men is the right of every citizen. It is not the peculiar privilege of the press. Newspaper writers stand in no better legal position than anybody else. Now a privilege is a right which I possess because I am I: because I hold a particular office, or stand in a particular position or confidential relation to some one else. A right which every citizen possesses merely because he is a citizen of the State, is no privilege at all.

So please do not confuse *bona fide* comment with privilege. It is really a very simple matter. The exercise of a right is not an actionable wrong. Legitimate criticism is no tort; should loss ensue to the plaintiff from the publication of a legitimate criticism, it will be *damnum sine injuria*. "It is only when the writer goes beyond the limits of fair comment that his criticism passes into the region of libel at all" (*per* Bowen, L.J., 20 Q.B.D. at p. 283).

But the criticism must be criticism, and not defamation. True criticism differs from defamation in three particulars:

(1) Criticism deals only with such things as invite public attention, or call for public comment. It does not follow a public man into his private life, or pry into his domestic concerns.

(2) Criticism never attacks the individual, but only his work. A true critic never indulges in personalities, or recklessly imputes dishonourable motives, but confines himself to the merits of the subject-matter before him.

(3) The critic never takes advantage of the occasion to gratify private malice, or to attain any other object beyond the fair discussion of matters of public interest, and the judicious guidance of the public taste. He will carefully examine the production before him, and then honestly and fearlessly state his true opinion of it.

To illustrate these distinctions, I will refer you to a case which was decided at the beginning of the century, as early as 1808. It was an action brought against Thomas Hood, the father of the poet, by a gentleman called Sir John Carr, who had written a book in 1805 called

The Stranger in Ireland, of which Mr. Hood made great fun in his *Pocket-book*, calling it "A Ryghte Merrie and conceited Tour"; and Sir John brought his action. His declaration—that was the name in those days for what we now call a Statement of Claim—is set out in full on page 355 of the first volume of Campbell's Reports. It enumerates the other books which Sir John had written, the copyrights of which he had sold for "divers large sums of money," and then continues—

"Which said books had been respectively published in quarto, yet the defendant, intending to expose him to, and to bring upon him, great contempt, laughter, and ridicule, falsely and maliciously published a certain false, scandalous, malicious, and defamatory libel, in the form of a book, of and concerning the said Sir John and of and concerning the said books, of which the said Sir John was the author as aforesaid, and which same libel contained therein a certain false, scandalous, malicious, and defamatory print, of and concerning the said Sir John, and of and concerning the said books of the said Sir John 1st and 2ndly above mentioned, therein called 'Frontispiece'; and entitled, 'The Knight (meaning the said Sir John) leaving Ireland with Regret,' and containing and representing in the said print a certain false, scandalous, and malicious, defamatory, and ridiculous representation of the said Sir John, in the form of a man of ludicrous and ridiculous appearance, holding a pocket handkerchief to his face, and appearing to be weeping, and also containing therein a certain

false, malicious, and ridiculous representation of a man of ludicrous and ridiculous appearance, following the said representation of the said Sir John, and loaded with, and bending under the weight of, three large books, one of them having the word 'Baltic' printed on the back thereof, etc., and a pocket handkerchief appearing to be held in one of the hands of the said representation of a man, and the corners thereof appearing to be held or tied together, as if containing something therein, with the printed word 'Wardrobe' depending therefrom (thereby falsely, scandalously, and maliciously, meaning and intending to represent, for the purpose of rendering the said Sir John ridiculous, and exposing him to laughter, ridicule, and contempt, that one copy of the said first-mentioned book of the said Sir John, and two copies of the said book of the said Sir John secondly above mentioned, were so heavy as to cause a man to bend under the weight thereof, and that his the said Sir John's wardrobe was very small, and capable of being contained in a pocket handkerchief."

The declaration concluded by laying as special damage,

"That the said Sir John had been prevented and hindered from selling to Sir Richard Philips, Knight, for a large sum of money, to wit, £600, the copyright of a certain book or work of him the said Sir John, of which the said Sir John was the author, containing an account of a tour of him the said Sir John through part of Scotland, which, but for the publishing of the said false, scandalous, malicious, and defamatory libels, he the said Sir John would, could, and might have sold to the said Sir Richard Philips for the said last-mentioned sum of money, and the same remained wholly unsold

and undisposed of, and was greatly depreciated and lessened in value to the said Sir John."

To this long-winded declaration, the defendant pleaded one short and simple plea, Not Guilty. The trial had not proceeded far before Lord Ellenborough, C.J., intimated his clear opinion that if the book published by the defendant only ridiculed the plaintiff as an author, the action could not be maintained. I will quote you his words :—

"Here the supposed libel has only attacked those works of which Sir John Carr is the avowed author; and one writer in exposing the follies and errors of another may make use of ridicule, however poignant. Ridicule is often the fittest weapon that can be employed for such a purpose. If the reputation or pecuniary interests of the person ridiculed suffer, it is *damnum absque injuria.* Where is the liberty of the press, if an action can be maintained on such principles? Perhaps the plaintiff's *Tour through Scotland* is now unsaleable; but is he to be indemnified by receiving a compensation in damages from the person who may have opened the eyes of the public to the bad taste and inanity of his compositions? Who would have bought the works of Sir Robert Filmer after he had been refuted by Mr. Locke? But shall it be said that he might have sustained an action for defamation against that great philosopher, who was labouring to enlighten and ameliorate mankind? We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and even to

ridicule, if their compositions be ridiculous; otherwise, the first who writes a book on any subject will maintain a monopoly of sentiment and opinion respecting it. This would tend to the perpetuity of error. Reflection on personal character is another thing. Show me an attack on the moral character of this plaintiff, or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sat here to protect him; but I cannot hear of malice on account of turning his works into ridicule."

The counsel for the plaintiff still complaining of the unfairness of this publication, and particularly of the print affixed to it, the trial proceeded. After the Attorney-General had addressed the jury on behalf of the defendant, Lord Ellenborough said:

"Every man who publishes a book commits himself to the judgment of the public, and any one may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. In the present case, had the party writing the criticism followed the plaintiff into domestic life for the purposes of slander, that would have been libellous; but no passage of this sort has been produced, and even the caricature does not affect the plaintiff, except as the author of the book which is ridiculed. The works of this gentleman may be, for aught I know, very valuable; but whatever their merits, others have a right to pass their judgment upon them—to censure them, if they be censurable, and to turn them into ridicule, if they be ridiculous.

The critic does a great service to the public, who writes down any vapid or useless publication such as ought never to have appeared. He checks the dissemination of bad taste and prevents people from wasting both their time and money upon trash. I speak of fair and candid criticism; and this every one has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider as an injury; because it is a loss which the party ought to sustain. It is, in short, the loss of fame and profits to which he was never entitled. Nothing can be conceived more threatening to the liberty of the press than the species of action before the Court. We ought to resist an attempt against free and liberal criticism at the threshold."

The Chief Justice concluded by directing the jury,

"That if the writer of the publication complained of had not travelled out of the work he criticised for the purpose of slander, the action would not lie; but if they could discover in it anything personally slanderous against the plaintiff, unconnected with the works he had given to the public, in that case he had a good cause of action, and they would award him damages accordingly."

The case ended in a verdict for the defendant.

Again, take the two actions of *Strauss* v. *Francis* (4 F. & F. 939 and 1107). The *Athenæum* published a critique on a novel written by the plaintiff, describing it as "the very worst attempt at a novel that has ever

been perpetrated," and commenting severely on "its insanity, self-complacency, and vulgarity, its profanity, its indelicacy (to use no stronger word), its display of bad Latin, bad French, bad German, and bad English," and its abuse of persons living and dead. After Erle, C.J., had summed up the case, the plaintiff withdrew a juror; which means that there was a drawn battle, and that each party paid his own costs. The *Athenæum* thereupon published another article, stating their reason for consenting to the withdrawal of a juror, which was, in fact, that they considered the plaintiff would have been unable to have paid them their costs, had they gained a verdict. The plaintiff then brought another action, which was tried before Cockburn, C.J., and the jury found a verdict for the defendants.

But you must not, from these two victories of the press, jump to the conclusion that you can write anything you like about a book or a play with impunity. There are limits to the right of criticism, as Lord Ellenborough pointed out.

If a critic, in reviewing a novel or a poem, were to make an attack on the private moral character of the writer, unconnected with his authorship, or to make a defamatory state-

ment of fact about him as an author (*e.g.* that he was the writer of some other book or play notorious for its immoral tone), he could not claim any protection for this as fair comment if it proved to be untrue. For it is not comment on anything; it is a false assertion, not an expression of opinion at all; it is an ordinary unprivileged libel, and can only be justified by strict proof of its truth. If, on the other hand, a critic makes any misstatement of fact about the book or play he is reviewing, it will be for the jury to consider whether this does or does not render the criticism unfair, unless it is obviously an immaterial slip about a mere detail. A slight unintentional error, which would not affect the reader's opinion of the book or play, would clearly be no ground for imputing unfairness. But a misstatement which conveyed an entirely false impression as to the whole motive of the book or play would be clearly unfair.

I will give you an example of this. Mr. and Mrs. Herman Merivale wrote a play called *The Whiphand*, the plot of which turned entirely on gambling. The giddy young wife of an elderly baronet is inveigled by a foreign

adventurer into constant *vingt-et-un*, till she loses £5000, which she cannot pay. All this is a secret from her husband, whose duties as an M.P. compel him to spend his evenings in the House of Commons. The foreigner, having thus "the whiphand" of Lady Felton, induces her to assist in inveigling others to play, and finally to connive at his cheating. There is not one word in the piece to which the most squeamish moralist could object on the ground of its indelicacy. The defendant published a criticism on this play, commencing thus :—

"*The Whiphand*, the joint-production of Mr. and Mrs. Herman Merivale, gives us nothing but a hash-up of ingredients which have been used *ad nauseam*, until one rises in protestation against the loving, confiding, fatuous husband with the naughty wife and her double existence, the good male genius, the limp aristocrat, and the villainous foreigner."

The case came on for trial before Mr. Justice Field on 3rd and 4th March 1887. The plaintiffs alleged that the word "naughty" was here used in a slang sense; and, taken in connection with "wife" and "fatuous husband," would convey to any one who read the review, but who had not seen the play, that

the plot turned on adultery, and that the play was of low moral character, and discreditable to authors of good literary position and repute. They also complained of the imputation that the play was not original. The defendant, on the other hand, contended that the word "naughty" had not and could not have any such meaning, that if it had it was no libel on an author to say that he had written a play dealing with the subject of adultery; and that if a critic in stating his honest opinion about a play used an ambiguous or infelicitous expression, conveying possibly to some an erroneous impression of the play criticised, such a slip of the pen would not make the passage libellous. It was admitted that the defendant bore the plaintiffs no ill-will, having previously inserted very favourable critiques of their works. There was no special damage. The jury found a verdict for the plaintiffs for one shilling damages, but the judge refused to deprive the plaintiffs of their right to costs. The verdict was upheld in the Court of Appeal (*Merivale and Wife* v. *Carson*, 20 Q.B.D. 275).

Hence you see that the right to comment on all matters of public interest is restricted

within certain limits. We may sum them up, thus: In order to relieve the defendant from liability,

(*a*) The words which he published must be fairly relevant to some matter of public interest.

(*b*) They must be the expression of an opinion, and not the assertion of a fact.

(*c*) They must not exceed the limits of a fair comment.

(*d*) They must not be published maliciously.

I will deal with each of these heads separately.

(*a*) First, what are the matters of public interest on which every one has a right to comment? This is a question for the judge, and not the jury (*per* Lopes, L.J., 1894, 1 Q.B. at p. 143). But as a rule there is not much difficulty about it. The public conduct of every public man is clearly a matter of public concern; so is the conduct of every public body, and the management of every public institution. Every man has a perfect right to express freely his honest opinion on all matters of general concern, such as the policy of the Government, all Government appointments, our relations with foreign coun-

tries, the conduct of all public officials, all proposals for reforming our laws or reducing taxation, and the administration of justice in our law courts. Nor need such matters be of national importance; you may freely comment on all matters of local public interest, *e.g.* all county or municipal affairs, the sanitary condition of any populous district, all measures adopted or proposed for adoption by the town council, vestry, school board, or sanitary authority, the collection and expenditure of the rates, the administration of the Poor Law, the conduct of all officers of the borough or county or of the rector of the parish; or, on any concert, flower-show, or public entertainment, on the speeches made at any public meeting, and even the conduct of the audience. Then, again, any man who publishes a book, or exhibits a picture, or performs a play, invites public criticism thereon; and such criticism, if fair and honest, is therefore no libel, however severe its terms may be. So with any tradesman's advertisement, or the prospectus of a public company, or any other appeal to the public to purchase goods or shares. But the critic or article-writer must not follow even a public man into his

private life. He ought never to pry into the private affairs of any individual, however famous or notorious. It may be that the public would be interested in such details; but it does not follow that the matter is one of general public interest within the meaning of the rule. A newspaper, in particular, which is addressed to the public generally, should deal only with matters which are of general public interest in the locality in which that newspaper circulates.

It is not always easy to draw the line, however, between matters which the law deems of public interest, and those which it does not. Take the case of *Kelly* v. *Tinling*, L.R. 1 Q.B. 699, for instance. There, the *Liverpool Daily Courier*, without asking the plaintiff's permission, published a correspondence which had passed between the plaintiff, who was the incumbent of St. George's Church, Liverpool, and one of his churchwardens. One of the letters written by the churchwarden contained the following passage:—

"I have observed with pain the church turned into a bookseller's shop during divine service by your errand-boy selling books under the pulpit, and money being jingled about in giving change, to the annoyance

of many of the congregation. Nor can I omit to allude to the desecration of the church by turning a portion of it into a cooking apartment, and endangering the sacred edifice, which I am bound to protect. . . . As you make use of St. George's Church for a number of purposes for which it was never intended, it becomes my painful duty to request that these improprieties may cease."

It was proved at the trial that the plaintiff's servant had been in the habit of selling hymn-books and receiving the money for them in the church, though the plaintiff had put a stop to this as soon as he heard of it. It was also proved that the plaintiff had had a potato, if not also a chop, cooked in the vestry between two services, because there was not time for him to go home to dinner. The learned judge referred the jury to some observations which he had made on the preceding day in another action brought by the same plaintiff against the *Liverpool Mail* for some other libels (for which he recovered one farthing damages—*Kelly* v. *Sherlock*, L.R. 1 Q.B. 686, 689). These observations were as follows:—

"The first question you have to decide is whether the publications were libels according to the law's definition of a libel. Anything which is calculated to bring a person into ridicule, hatred, or contempt is a libel. Although that is true as a general rule, yet it

is also true—and happy for us it is that it is true—that every man has a right to discuss matters of public interest. A clergyman with his flock, an admiral with his fleet, a general with his army, and a judge with his jury—we are all of us the subjects for public discussion. So also is it matter of public interest, the dispute between the plaintiff and his organist, and the way in which the church is used—they are all public matters, and may be publicly discussed. And, provided a man, whether in a newspaper or not, publishes a comment on a matter of public interest, fair in tone and temperate, although he may express opinions that you may not agree with, that is not a subject for an action for libel; because whoever fills a public position renders himself—again happily—open to public discussion, and if any part of his public acts is wrong he must accept the attack as a necessary, though unpleasant, circumstance attaching to his position. In this country everything, either by speech or writing, may be discussed for the benefit of the public. No doubt, therefore, the defendant was at liberty to discuss the opinions or proceedings of the plaintiff. If he has done it fairly, temperately, and calmly, then he is not the fit subject for an action for libel."

The jury returned a verdict for the defendant.

One word of caution as to comments on judicial proceedings. As I have already told you, the administration of justice in our law courts is a matter of public interest. Every judicial proceeding then may properly be made the subject of comment; but only when the

trial is over, not before. No observations are permitted during its progress, lest the minds of the jury, and indeed of the judge also, should be influenced thereby. Any comment pending action is a contempt of Court, punishable by fine or imprisonment, although the article be written temperately, and with due respect to the Court, and be in all other respects such an article as might properly be published after the trial is ended. And after the case is over, there still are limits to the freedom of criticism allowed. The article-writer is bound to exercise a fair, honest, and impartial judgment, and must not recklessly assail the characters of others or impute to them dishonourable or criminal conduct. Thus, it is not a fair comment on a criminal trial to suggest that the prisoner, though acquitted, was really guilty, or to insinuate that a particular witness committed perjury. And the distinction should be carefully observed between the reports of the proceedings and the leading articles or other comments on them. A report is the record, in a more or less condensed or abridged form, of something that actually took place. A comment is the judgment passed on what took place by some one

who has considered the matter, and formed an opinion about it which he states for the benefit of others. These are clearly quite distinct and separate things, and should be kept apart in the paper. As Lord Campbell once remarked, "If any comments are made, they should not be made as part of the report. The report should be confined to what takes place in Court, and the two things, report and comment, should be kept separate."

This distinction runs through the whole law on the subject. Different legal principles apply to the two kinds of composition; for whereas fair reports are (as a rule) privileged, fair comments, if on matters of public interest, are not libels at all. So again, where a trial lasts more than one day, daily reports of the proceedings may be published, but no comments may be made on the case till the trial is at an end.

(*b*) Next, the words complained of must be the expression of an opinion and not the assertion of a fact. If you state as a fact that a Government official or a candidate for Parliament did a certain act which he never did, then the fact that if he had done it, such conduct would have been a matter of public

interest, will not help you. You must prove your words true, or pay damages. A newspaper actually has no right to publish lies, even of a public man! Comment on well-known or admitted facts is a very different thing from unsubstantiated assertions as to matters of fact upon which you propose to comment. Such assertions are not comments upon anything. They are not comments at all. This distinction was very clearly pointed out by the Irish Exchequer Division in the case of *Lefroy* v. *Burnside*, 4 L.R.Ir. at p. 565.

"That a fair and *bona fide* comment on a matter of public interest is an excuse of what would otherwise be a defamatory publication is admitted. The very statement, however, of this rule assumes the matters of fact commented upon to be somehow or other ascertained. It does not mean that a man may invent facts, and comment on the facts so invented in what would be a fair and *bona fide* manner on the supposition that the facts were true. . . . If the facts as a comment upon which the publication is sought to be excused do not exist, the foundation of the plea fails."

An illustration comes from the Cape—*Davis and Sons* v. *Shepstone*, 11 App. Cas. 187. There the appellants were the owners of a daily newspaper called *The Natal*

Witness, in which they constantly attacked the official conduct of the respondent, the British Resident Commissioner in Zululand. In particular, they asserted that he had himself violently assaulted a Zulu chief; that he had set on his native police to assault and abuse other Zulu chieftains, etc. They vouched for the truth of these stories, declaring that, though some doubt had been thrown on them, they would prove to be true on investigation. Then they proceeded, on the assumption that the charges were true, to comment on the respondent's conduct in most offensive and injurious language. At the trial in Natal, on 4th September 1883, it was proved that the charges against the respondent were absolutely without foundation. The appellant made no attempt to support them by evidence. The jury found a verdict for the plaintiff for £500 damages, and a motion for a new trial was refused by the Supreme Court of Natal. On appeal to this country, the Judicial Committee of the Privy Council held that such defamatory charges were in no way privileged, that they were not fair comment on anything, that the damages were not excessive, and that no

ground was shown for a new trial. Lord Herschell, L.C., stated the distinction between comment or criticism and allegations of fact in very clear and forcible language :—

"Comment on well-known or admitted facts is a very different thing from the assertion of unsubstantiated facts for comment. There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct."

But sometimes a phrase may appear to assert a fact when you take it by itself, and yet you will find, if you study its context, that it is really only a comment on some other facts, or an inference from them. If I say you are "not straightforward," *simpliciter*, without more, that would be the assertion of a fact. But if I say that A asked you a question, and you replied "Yes" to it; that the next day you were asked the same question by B, and told him "No"; and then

I add that such conduct is not straightforward, that last observation is a comment on the preceding facts; and if the preceding facts be correctly stated I need not prove my comment true, if facts and comment all relate to a matter of public interest. In other words, if I state a bare inference without the facts on which it is based, my inference will be treated as an allegation of fact. But if I set out the facts correctly, and then give my inference, making it clear that it is my inference from those facts, it will, as a rule, be deemed a comment. And there is common sense in this. For if I set out the facts on which my opinion is based, my readers can judge for themselves whether my opinion is well founded or not. They may see no harm at all in the conduct which I condemn. But if I do not state the facts, or state them incorrectly, then I do not enable you to form your own opinion on the matter. If I make the bare statement that "A B is a swindler," or "a liar," then that is not an inference from anything or a comment on anything. It is just an allegation of fact which I must prove true, or for which I must establish a privilege, if I am to escape paying damages to A B.

(*c*) Then the words must not exceed the limits of a fair comment. As soon as the judge has decided (and it appears that it is for him and not the jury to decide this) that the matter commented on is one of public interest, the more difficult question arises, "Is the comment on it a fair one?" This is a question for the jury, unless the comment is so clearly fair and legitimate that there can be no question about it. How are they to answer it? There is not to be found anywhere in our law-books any definition of a fair comment; though there are a great many cases reported in which the jury has found a particular criticism *unfair*, and their finding has been approved by the Court. Possibly learned judges have thought it best not to formulate any definition, but to leave the jury to decide each case on its own merits. "Nothing is more important," as Mr. Justice Crompton said in the case I dwelt on at the beginning of this lecture (*Campbell* v. *Spottiswoode*, 3 Best and Smith, at p. 778), "than that fair and full latitude of discussion should be allowed to writers upon any public matter, whether it be the conduct of public men or the proceedings in Courts of Justice, or in

Parliament, or the publication of a scheme, or of a literary work. But it is always to be left to a jury to say whether the publication has gone beyond the limits of a fair comment on the subject-matter discussed. A writer is not entitled to overstep these limits." The learned judge, however, does not proceed to tell us what the limits are which must not be overstepped; probably because it is impossible to lay down any general rule.

But later judges have thrown much light on the matter. I spoke just now about the play called *The Whiphand*. Well, the judgments delivered in that case in the Court of Appeal are most valuable. You should read them most carefully. You will find there all the law there is on the question—What are the limits of legitimate criticism? (*Merivale and Wife* v. *Carson*, 20 Q.B.D. 275). I may state it thus: So long as a critic makes no attack on the author apart from his work, and makes no false assertion of fact about either, but honestly states his genuine opinion as to the book or play on which his criticism is invited, then it is very difficult to say when the bounds of fair criticism are exceeded. It is clearly not necessary that the jury should

agree with the critic; he is entitled to publish his own opinion, however mistaken or unsound others may think it. The jury are not to be asked whether he formed this opinion with sufficient care or on reasonable grounds. So, too, the fact that his words are strong or even intemperate is not enough to make his criticism unfair. Lord Esher, M.R., states the law thus on p. 280:—

"Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment. Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this:—Would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said."

If the jury, after looking at the book or the play, think the criticism published by the defendant was such that no fair man could possibly have come to that conclusion about it, then and then only are they to find for the plaintiff. I think this decision is eminently satisfactory, both as protecting authors from

all deliberate misrepresentation, and at the same time as affording every reasonable protection to that liberty of speech which is essential to the honour and integrity of the press.

(*d*) Lastly, the defendant must not have acted maliciously in the matter. The word "fair," in the phrase "a fair comment," refers to the language employed, and not to the mind of the writer. Hence it is possible that a fair comment should yet be published maliciously. Suppose, for instance, that A and B are both suitors for the hand of the same young lady. A writes a book or a play which is severely criticised in the *Times*. The criticism, though severe, is nevertheless a fair comment on the play. It honestly expresses what the critic on the staff of the *Times* really thought of the production. B reads this, and is delighted, and he sends a copy of that issue of the *Times* to the mother of the young lady, hoping and intending thus to injure his rival. Will an action lie for this malicious publication of what all the time is a fair comment? I think it will, and there is some ground for that opinion in the dictum of Lord Esher, M.R., in *Merivale* v. *Carson*, 20 Q.B.D. at p.

281, though the point is far from clear. A dagger may be a perfectly legitimate weapon to use in fair fight, but it does not follow that you are entitled to stab your foe in the back with it.

But in the absence of any such express malice the defendant will be entitled to judgment in any action of libel, if he satisfies the jury that his words were fairly relevant to some matter of public interest, and that they were a fair comment on that matter, the honest expression of his own opinion, and not a false statement as to some matter of fact.

III

CONSTRUCTION AND TRUTH

Construction

Those of you who attended my two former lectures have, I trust, some idea now as to what a libel is. You know, at all events, that a fair comment on a matter of public interest is not a libel; so we will exclude such comments from our consideration in future. So, too, we will put on one side henceforth all actions of slander of title, or trade-libel, or actions on the case for malicious injury; and we will confine our attention to libels on an individual, *i.e.* to written or printed words defamatory of some person. Now I told you that words were defamatory when they injured some one's reputation, when they made people think worse of him; or, if you prefer a longer phrase, when their obvious tendency

is to bring him into ridicule, hatred, or contempt.

But before words can injure a man's reputation, they must be understood. People will not think worse of the plaintiff, if the defendant's words are unintelligible; or if their defamatory meaning is so hidden that no third person can detect it. It is not enough that the plaintiff perceives the meaning of the words and feels their hidden sting. Some third person must understand them, and understand them in a defamatory sense. For, as I told you when we were dealing with publication, a man's reputation is the esteem in which others hold him, not the good opinion which he has of himself. And unless his reputation be injured, no action lies.

Now it often happens that a person who desires to injure the reputation of another has not the courage to say out boldly all he means. He prefers to wrap it up, to drop a hint here and an insinuation there, and leave his readers to draw their own conclusions. This requires less pluck in the libeller, and also, as a rule, does more harm to the reputation of the person attacked. For those to whom the words are published put the blackest

construction on these dark hints; and often indeed a blacker one than the libeller intended to convey.

But that does not matter in the least. The secret intention of the writer is quite immaterial, if his words reasonably convey that blacker meaning to his reader. He cannot be heard to say: "Oh! I only intended to suggest that there was something like a flirtation going on between Mr. A and Mrs. B; I never dreamt that my words would be understood as insinuating anything worse." If that were true—and it generally in such cases is not—then the defendant is to blame for expressing himself in such misleading phrases. He should have stated his meaning clearly. As it is, he has by his ambiguous hints injured the reputation of two innocent persons, and he must pay damages.

That is always the test: Has the reputation of the plaintiff in fact been injured, and, if so, to what extent? And this depends on how third persons understood the defendant's words, not on how the defendant meant third persons to understand them. A man who says or writes nasty things about others cannot complain if his neighbours take him to mean

what he says. Put it the other way. Suppose he meant to convey something very unpleasant, but hinted it so darkly that no one understood what he meant; then, however malicious the defendant may have been, no action lies against him, because the plaintiff's reputation has sustained no injury. If, for instance, the defendant with a grave face praised a good man ironically, meaning his words to be taken in the contrary sense, his intention would be immaterial; the right of action would wholly depend on how his words were understood. So, if you called me an ugly name in French or Welsh, and no one present understood the language which you used, then I cannot sue you, though I understood you perfectly; because my reputation is not injured. Or suppose—pardon me—that you thought you knew French or Welsh, but did not, and that you called me by a name that you thought was harmless or even complimentary, whereas really that word, as you pronounced it, meant that I had committed some atrocious crime and was so understood by those who listened to your remarks; then you are liable to an action, because your words have in fact injured my reputation,

though this was not what you intended. And generally, if you say one thing and mean another, the law will seize on what you say, and disregard what you meant. Grown-up men and women must learn to express themselves properly.

Then, again, you must be very careful how you make jokes before serious-minded persons. If you libel a man in jest, and your readers take you in earnest, you jest at your peril. This was what Mr. Hayes discovered in 1831, in the Irish Court of Exchequer. He stated publicly that Mr. Donoghue had been detected taking dead bodies out of the churchyard and had been fined for the offence. And when Mr. Donoghue brought his action, Hayes pleaded that he meant this as a joke. A very gruesome joke at the best; he could not have been born in Ireland, I think! But it did not appear that any of the bystanders understood that he was joking. And the Lord Chief Baron said: "The principle is clear that a person shall not be allowed to murder another's reputation in jest. But if the words be so spoken that it is obvious to every bystander that only a jest is meant, no injury is done, and consequently no action would lie."

It does not matter therefore what meaning a writer intended to convey. It may be that to his mind his language was harmless; but if his readers reasonably attached to it an injurious meaning, he is liable for the ambiguous phrase which he so injudiciously selected. In all these cases the only question is what meaning would the words convey to ordinary Englishmen who read them without any previous knowledge of the circumstances to which they relate. And this of course is pre-eminently a question for the jury, who are twelve ordinary Englishmen.

Many cases are reported in which a plaintiff has recovered damages for words which, *prima facie* at all events, are innocent or meaningless. There is an old case in which the Court solemnly decided that to say of a merchant, "He hath eaten a spider," was "actionable with a proper averment of what the meaning is." This was decided in the year 1636 (*Franklyn* v. *Butler*, Pasch. 11 Car. I.). But the report does not vouchsafe any explanation of the meaning of this extraordinary phrase; and I am unfortunately not sufficiently proficient in the slang of the days of Charles I. to be able to throw any light on

the matter. About the same time it was decided that to say to an attorney, "Thou art a daffodowndilly," was actionable, because in those days that poetic phrase was understood —why, I know not—to denote that the attorney in question had taken a fee from both sides, and had betrayed to one client the secrets of the other. But in more recent days, when Mrs. Rawlings brought an action for the words "You are a bunter," she was non-suited, the learned judge (Willes, J.) holding that that word had no meaning at all, and could not therefore be defamatory in ordinary parlance; and he refused to allow the plaintiff to be asked what the word "bunter" meant.

Again, there may be cases in which the imputation is clear, but it is not obvious to whom the words relate. To enable a particular plaintiff to come forward and bring an action, not only must the charge be definite, but it must be clear at whom it is aimed. This must appear from the words themselves. No plaintiff can sue on a charge which is levied against mankind in general. As Willes, J., said in 1858 in the case of *Eastwood* v. *Holmes* (1 F. & F. at p. 349), "If a man

wrote that all lawyers were thieves, no particular lawyer could sue him, unless there is something to point to the particular individual." Or take the instance suggested by Lord Denman in *Solomon* v. *Lawson* (8 Q.B. 837), "Suppose the words to be 'a murder was committed in A's house last night,' no introduction can warrant the innuendo 'meaning that B committed the said murder'; nor would it be helped by the finding of the jury for the plaintiff. For the Court must see that the words do not and cannot mean it, and would arrest the judgment accordingly."

In short, words will not be libellous unless they convey some definite imputation on some definite person, and that person must be the plaintiff in the action. If no one can tell what the words mean, there is no libel; for no man's reputation has suffered. If no one can tell to whom the words refer, there is no libel on the plaintiff; for *his* reputation at any rate has not suffered.

Whenever it is not obvious from the words themselves who is the person referred to or what is the imputation cast upon him, the difficulty may be got over to some extent by

the plaintiff's inserting in his pleading an averment, which is called an *innuendo*, stating what he understands the words to mean. Thus, he would plead that he (the plaintiff) was a stockbroker, and that "the defendant falsely and maliciously wrote and published of him the words 'He (meaning the plaintiff) is a lame duck,' meaning thereby that the plaintiff had not fulfilled his contracts in respect of certain stocks and shares which he had bought in the course of his business as a stockbroker." So, too, in the case of the "daffodowndilly," the pleading in fact ran, "'Thou (meaning thereby the plaintiff) art a daffodowndilly,' meaning thereby that the plaintiff was an ambidexter," a phrase which, though now almost as incomprehensible as the word which it sought to explain, was in those days a term generally known to the law. So, had there been a proper averment in the pleading to explain what meaning the word "bunter" conveyed in the year 1858, Mrs. Rawlings might have won her action; for with an innuendo evidence of the meaning of that strange word would have been admissible. Hence, whenever the words are *prima facie* harmless or *prima facie* meaningless, if you

are counsel for the plaintiff you must be sure and plead an innuendo in your Statement of Claim.

But the innuendo must be a reasonable one; it must be in accordance with the facts, and not an invention of an imaginative attorney's clerk. The innuendo can only be used to evolve the true though latent meaning of the defendant's words, to make clear to the Court and the jury what was in fact in the defendant's mind. It must not be too far-fetched. I found an instance of a very wild innuendo in the law reports of Massachusetts. The words were: "I was speaking to a lady about Mrs. York's case": and the innuendo was "meaning thereby that the plaintiff (Mrs. York) had been guilty of adultery!" That innuendo was disallowed. It is always for the judge to determine whether the words used are capable of the meaning which is alleged in the innuendo; it is for the jury to determine whether the words did in fact convey that meaning to those who read them. If the judge thinks the words are incapable of that meaning he will stop the case; as was done in *Mulligan* v. *Cole*, 1875, L.R. 10 Q.B. 549. In that case the plaintiff

was a certificated art master, and had been master at the Walsall Science and Art Institute. His engagement there ceased in June 1874, and he then started, and became master of, another school which was called "The Walsall Government School of Art," and which he opened in August 1874. In September the following advertisement appeared in the *Walsall Observer*, signed by the defendants, who were respectively the chairman, treasurer, and secretary of the Institute. "Walsall Science and Art Institute.—The public are informed that Mr. Mulligan's connection with the Institute has ceased, and that he is not authorised to receive subscriptions on its behalf." The declaration set out this advertisement with an innuendo—"meaning thereby that the plaintiff falsely assumed and pretended to be authorised to receive subscriptions on behalf of the said institute." At the trial Quain, J., directed a non-suit, on the ground that the advertisement was not capable of the defamatory meaning attributed to it by the innuendo. And the full Court of Queen's Bench held that the non-suit was right; that the advertisement was not capable of any defamatory meaning. This case is very similar

to one which I mentioned in my first lecture (*Nevill* v. *Fine Arts and General Insurance Company, Limited*), *ante*, p. 10.

After all, "the office of an innuendo" is nowhere more clearly or better defined than in the old case of *James* v. *Rutlech* (4 Rep. 17, *b*), decided so long ago as 1599. I like to quote to you these old cases occasionally, to show you that our law is no new system recently invented — that it is not a Code Napoleon, for instance, imposed by an emperor on an unwilling people—but a thing of our own, a home product, which has grown and developed with the English race. Able judges and learned lawyers have done their best to improve it and strengthen it as the years rolled by. Parliament, too, has tried its 'prentice hand in various—and no doubt well-meant—attempts to amend our law. But still it is the same in substance. It is the same old tree; though the trunk be thicker, though the branches spread farther, they are all sprung from the same root. And that is why it constantly happens that for a clear exposition of the meaning of some of our best-known rules of law, we must turn back to the days of Queen Elizabeth and James I., and to those

volumes of Lord Coke's, which are styled *par excellence* "Reports."

In those days there was much talk about "certainty"—that is, precision, in pleading. And they were very fond of a legal maxim which still holds good: *Id certum est quod certum reddi potest.* Still, if the defendant's meaning could not be discovered for certain from his words and acts, or from the surrounding circumstances, *certum reddi non potest*, it was not capable of being made certain at all. If the words are in their essence loose and vague, no innuendo can make them definite. If the words refer to nobody in particular, the cleverest innuendo will not enable any one to succeed in an action, because no one's reputation has been injured. And this is how the Court of Queen's Bench stated these propositions in the days of Queen Elizabeth:—

"An innuendo cannot make a person certain who was uncertain before. For it would be inconvenient that actions should be maintained by imagination of an intent which doth not appear by the words upon which the action is grounded, but is altogether uncertain and subject to deceivable conjecture," . . . and "as an innuendo cannot make the person certain which was uncertain before, so an innuendo cannot alter the matter or sense of the words themselves."

Let us deal a little more in detail with each of these two heads: certainty as to the person defamed, and certainty of the imputation.

(i.) CERTAINTY AS TO THE PERSON DEFAMED

The person libelled need not be named. It is sufficient if the reader can ascertain who he is. He may be referred to by a nickname, or merely his initials given. As Lord Hardwicke said in 1742: "All the libellers of the kingdom know now that printing initial letters will not serve the turn, for that objection has been long got over." If asterisks be put instead of the name of the person libelled, the plaintiff can sue, if those who know him are able to gather from the libel that he is the person meant. And he can call his friends and acquaintances as witnesses at the trial to state how they understood the words when they read them. So if a man write, "I have known women steal yarn before," it may be clear from the context that what he really means is that a particular woman has been stealing yarn now. In a recent case (*Hird* v. *Wood*, 38 Sol. J. 234) the plaintiff complained

of a placard which had been publicly exhibited in the neighbourhood in which he lived. It ran as follows: "Subscriptions for A and B, who have been ruined in their business and their living taken away by the animosity of one man," etc. And the plaintiff satisfied the jury that he was the "one man" referred to by calling witnesses who had read the placard, and had at once concluded that it referred to him.

Again, words which at first sight appear only to refer to A may yet be also defamatory of B. Thus, to assert that a man is illegitimate is a charge of adultery or unchastity against his mother.

If the words reflect impartially on some one of a certain number or class, and there is nothing to show which one is meant, no action lies. But if the words reflect on each and every member of a certain body or class, then each or all can sue. Thus, if a man libels A's brother or A's partner and A has only one brother or only one partner, that brother or partner can sue; but if the words were, "One of A's brothers is perjured," and A has several brothers, no one of them can sue, unless there are some special circum-

stances to show to which one the writer referred.

So if a man says to the plaintiff's servant, "Thy master Brown has robbed me," Brown can sue; for it shall not be intended that the person addressed had more than one master of the name of Brown. So, if the defendant had said, "Thy master" *simpliciter*; or to a son, "Thy father"; or to a wife, "Thy husband." But if the defendant said to a master, "One of thy servants hath robbed me," in the absence of special circumstances no one could sue; for it is not apparent who is the person slandered.

So where a party in a cause said to three men who had just given evidence against him, "One of you three is perjured," it was held that no action lay. But had he said, "Each of you is perjured," or, "You are all three perjured," three actions would have lain, one by each of them.

Still a general imputation on a class may yet really refer solely or specially to some particular member of that class. Thus, where a newspaper article imputed that "in some of the Irish factories" cruelties were practised upon the workpeople, the plaintiffs, who were

Irish manufacturers, set out the words in their pleading with an innuendo, "in the factory of the plaintiffs." The jury were satisfied from the evidence called before them that the newspaper was referring especially to the plaintiffs' factory, and found a verdict for the plaintiffs; and the House of Lords upheld the innuendo and the verdict (*Le Fanu* v. *Malcolmson*, 1 H.L.C. 637).

Or, if you will allow me to invent a case, suppose a newspaper published a libel on "an eminent Q.C." There are several eminent Q.C.s. Suppose the friends of two different Q.C.s, both eminent, each arrive at the conclusion that the words were aimed at their particular friend. Can both Q.C.s sue? Or neither? Or if only one, which?

Well, if both sets of friends reasonably and honestly arrive at their respective opinions, I think both Q.C.s can sue; for the reputation of both has been injured. The defendant is to blame for expressing himself so ambiguously. If A brings an action and satisfies the jury that many persons reasonably understood the words to refer to himself, I do not see that it would be any defence for the defendant to try and show that many other persons reason-

ably supposed that the words referred to B. Still, I should advise any friend of mine so libelled to be the first Q.C. to sue.

(ii.) CERTAINTY OF THE IMPUTATION

So long as the defendant's words are not absolutely unintelligible, a jury can judge of the meaning as well as any other person who reads them. All obscurity will disappear under the severe scrutiny which the words will receive in a court of law. It matters not whether the defamatory words be in English, or in any other language that is understood in England, whether they be spelt correctly or incorrectly, whether the phrase be grammatical or not, whether slang terms be employed, or the most refined and elegant diction. The insinuation may be indirect, and the illusion obscure, it may be put as a question or as an "on dit"; the language may be ironical, figurative, or allegorical, it may be disguised in a riddle or in hieroglyphics; still, if there be a meaning in the words at all, the Court will find it out. If a man be compared to "Judas," or "Ananias," or to "the impenitent thief," every one will understand such

allusions as those. In 1848 Miss Hoare recovered damages because Mr. Silverlock wrote a letter to a newspaper, in which he said that "some who were her warmest friends stated that they had realised the fable of the Frozen Snake"; and the Court held that no innuendo was necessary to explain the allusion. And when the *Morning Post* concluded an attack on the conduct of Mr. Woodgate, who had been solicitor to Lord Egmont, with the words, "Messrs. Quirk, Gammon, and Snap were fairly equalled, if not outdone"; a copy of *Ten Thousand a Year* was put in at the trial and taken as read. I myself was once paid to read *The Strange Story of Dr. Jekyll and Mr Hyde;* some one had compared a virtuous plaintiff to Mr. Hyde; and a copy of Mr. Stevenson's book accompanied my instructions. Counsel, of course, never have any time to read novels!

In all these cases it is simply a question for the jury to decide what meaning the words convey to readers of ordinary intelligence. And they should always read the whole letter or paragraph before deciding that it is a libel. They should look at the context. If in one part appears something to the plain-

tiff's credit, in another something to his discredit, "the bane" and "the antidote" should be taken together; they may be found to neutralise each other. The jury should not dwell on isolated passages, but judge of the publication as a whole, giving its proper weight to every part. Sometimes the sting of a libel will be found in its tail, sometimes in a heading or catchword prefixed to a paragraph otherwise unobjectionable. Mr. Boydell recovered judgment in 1838 for a paragraph which apparently gave an accurate account of something that had occurred in Judge's Chambers, but which was headed "an honest lawyer." It appeared from the context that these words were meant ironically, and they clearly referred to Mr. Boydell. So, too, where a correct report of a certain trial was published in the *Observer* with a heading, "Shameful conduct of an attorney," the Court held that these words were a libel, though all that followed was privileged (*Lewis* v. *Clement*, 3 B. & Ald. 702). So a word at the end of a paragraph may alter its whole meaning. Take, for instance, the paragraph which appeared in the *True Sun* newspaper on 18th December 1832:—

"Riot at Preston.—From the *Liverpool Courier*.—It appears that Hunt pointed out Councillor Seager to the mob, and said, 'There is one of the black sheep.' The mob fell upon him and murdered him. In the affray Hunt had his nose cut off. The coroner's inquest have brought in a verdict of wilful murder against Hunt, who is committed to gaol.—Fudge!"

This paragraph had appeared without the word "fudge" in the *Liverpool Journal* (not the *Courier*) four days previously. Without that word it was clearly a libel, and it was certainly untrue. Nothing of the kind ever happened, and Mr. Hunt, "the Radical," brought his action. At the trial the discussion mainly turned on this concluding word. Was it inserted honestly in order to vindicate the plaintiff's character from an absurd and preposterous charge, as the defendant contended? If so, there was no libel. Or was it merely introduced, as the plaintiff alleged, in order that it might be referred to on a future day as showing that the defendant intended to discredit the story? The jury were puzzled, and in the end they awarded the plaintiff one farthing damages, a verdict which in those days carried with it one farthing and no more for costs (6 C. & P. 245).

In short, if a defamatory imputation be in fact conveyed to the reader, it does not matter how it was expressed. It may be hinted or implied, suggested by a question or a mere adjective, hidden under a nickname or some ironical phrase. If the words in their natural and obvious meaning are harmless, still a further question may arise—Were there any facts known both to writer and reader which would lead the latter to understand the words in a secondary and a defamatory sense? This is a question for the jury, provided there be any evidence to go to them of such facts, and provided also it is reasonably conceivable that such facts, if proved, would have induced the reader so to understand the words. This was decided in the leading case of the *Capital and Counties Bank* v. *Henty and Sons*, 1880, 5 C.P.D. 514; 7 App. Cas. 741.

Here is an instance in which a defamatory meaning lay hidden under words which seemed perfectly harmless. The defendant said to an upholsterer: "You are a soldier; I saw you in your red coat doing duty." These words do not appear to be actionable till you learn that it was then a common practice for tradesmen to sham enlisting so as to avoid being

arrested for debt. The words were therefore held actionable as damaging the credit of a trader (*Arne* v. *Johnson*, 10 Mod. 111).

Again, words may acquire a defamatory meaning from the place in which they stand in a document, or from the position in which they appear. I am informed that the wax model of Mr. Monson, which was exhibited by the successors of Madame Tussaud, was an excellent likeness of him. But they thought fit to place it at the threshold of the "Chamber of Horrors," and in close proximity to images of Mrs. Maybrick, Pigott, and Scott. Hence the Court held that it was open to the jury to find that the defendants intended their visitors to draw from these surroundings an inference injurious to the plaintiff (*Monson* v. *Tussauds, Limited*, 1894, 1 Q.B. 671).

In another case (*Williams* v. *Smith*, 22 Q.B.D. 134) the defendants published, what was perfectly true, that judgment had been recovered against the plaintiff in the County Court for £27 : 1s. They did not say (what was the fact) that the judgment had since been satisfied. On the other hand, they did not say it had not been. But they published

it in a *Trade Gazette*, by the side of "Bankruptcy Notices," and items as to "Bills of Sale," and it was held that the jury might properly find that the words so published implied that the plaintiff was unable to satisfy the said judgment, or to pay his just debts.

So Miss Ella Russell recovered £100 damages because her name was placed in the middle of the programme of a concert, whereas it should have come first, and the defendant had undertaken to place it first. Evidence was called at the trial to show that in the musical world the order in which the names appeared conveyed a particular meaning, the best singers being usually placed either first or last, and those of less reputation in the middle (*Russell* v. *Notcutt*, 1896, 12 Times L.R. 195).

But in all these cases, whenever it is not obvious from the words themselves what the imputation is, or who is the person referred to, there should always be an *innuendo* inserted in the plaintiff's pleading to make the matter clear. Contrast these two cases. In one the words were, "Did he have a fire twice? He is a funny fellow!" and the Statement of

Claim contained no innuendo at all; it was held that no action lay, for there was nothing to show that the words imputed a crime (*Jacobs* v. *Schmalz*, 62 L.T. 121; 6 Times L.R. 155). In another case the plaintiff's house had been insured; when it was burnt down, the insurance company at first demurred to pay the insurance money, but ultimately paid it. The defendant subsequently, in the course of a quarrel with the plaintiff, said, in the presence of others, "I never set my premises on fire"; and "I was never accused of setting my premises on fire." These words were set out in the Statement of Claim with proper innuendoes, and they were held to be a slander on the plaintiff (*Cutler* v. *Cutler*, 10 J.P. 169).

In this way, with the aid of an innuendo, where necessary, the plaintiff must satisfy the jury that the words of which he complains have in fact conveyed to the minds of some at least of those who read them a definite imputation on a definite person, and that definite person must be himself. As soon as he has established these facts, and also that it was the defendant who published those words in print or writing, he has made out a *prima facie* case.

Truth

And now we pass on to consider what is the defendant's answer to the plaintiff's *prima facie* case. The defendant in his pleading will probably deny some, or perhaps all, of the material allegations in the Statement of Claim. It is foolish, as a rule, in an action of libel to deny them all. It looks weak. For instance, if the words really have appeared in the defendant's newspaper, he had better be honest and admit the fact, if for no higher reason than this—that the plaintiff can prove the publication at the trial in five seconds, just by putting in a copy of the newspaper. The denial of a material fact alleged by the plaintiff is called a traverse. The defendant may traverse the publication alleged, or the innuendo. He may traverse the statement that the words refer to the plaintiff, but that is a line of defence which seldom succeeds. There is no necessity in an action of libel to traverse any allegation of damage.

But in addition to all these traverses the defendant may of course set up some affirmative defence; or he may pay money into Court, or plead an apology, or the Statute of

Limitations. But the two special defences which are peculiar to an action for defamation are Privilege and Truth. The *onus* of proving each of these defences lies on the defendant.

Privilege is a matter which I will reserve for my next lecture. But there is still time to deal to-night with the plea that the defendant's words are true. This is technically called "a plea of justification." It is a complete answer to the action. If the words are true, there is an end of the matter; the plaintiff cannot recover damages because his reputation has been brought down to its proper level, however malicious the defendant may have been in writing the libel.

This may be to some extent a surprise to some of you: because there is a time-honoured saying which men still often quote: "The greater the truth, the greater the libel." The sort of man you meet in the train is very proud and very fond of this phrase: he constantly refers to it in order to display his knowledge of law, and also generally to prove to his listeners how wicked and absurd the law of England is,—as though that law was something which did not belong to him, and for which he was in no way responsible! It

is amusing to hear that man talk law—for a little while. Of course he is all wrong. The maxim "the greater the truth, the greater the libel" never had any application at all to civil actions for damages: it was formerly the law in criminal cases; but even there it was modified, many years ago, as we shall see.

Still, you may say, it does seem hard that a man should be permitted to rake up some ancient misconduct, some youthful indiscretion of mine, and publish it to all the world years afterwards, when I am leading a blameless life. So it is. In former years prisoners used frequently to complain that they found it impossible to earn an honest living, when they came out of prison, because, as soon as they obtained employment anywhere, the police would inform the employer of their previous conviction and then they were at once discharged. If this ever was the practice of the police, I am glad to think that it has ceased. Learned judges have expressly declared that it is not the duty of the police to do so; but that on the contrary such action was "unnecessary officious and cruel." Still it is not actionable. Even in cases where the malice of the defendant is clear, no action lies if the

defendant has said no more than the literal truth. No law can be framed which cannot be made to press harshly on individuals under exceptional circumstances and in the hands of uncharitable persons. But, as a rule, the strictness with which a defendant is made to prove his plea of justification, is a sufficient protection to a plaintiff; for if a man is really malicious in making a statement, he is almost sure to go beyond the truth, and say too much; and then his plea will fail.

It is presumed in favour of a plaintiff that all defamatory words are false. The plaintiff therefore need give no evidence to show that the libel is false; it is for the defendant to prove that his words are true. And he will not be allowed to try and prove this, unless he has specially pleaded in his Defence that the words are true. He must prove that the whole of the words set out in the Statement of Claim are substantially true. It is no defence that they are half true, or three-quarters true. He must go the whole length or submit to judgment.

This is what lawyers mean when they say, "The justification must be as broad as the charge, and must justify the precise charge."

The defendant cannot plead that he published other words than those set out in the Statement of Claim, and that such other words are true. Still less is it a defence for him to say that there were other unpleasant things which he *might* have written about the plaintiff with perfect truth, but did not. The Court keeps to the charge actually made. If you have written and published of me that I am "a housebreaker," you will not be allowed to prove that I broke the bank at Monte Carlo; though that might have been relevant if it had only occurred to you to call me a gambler. Or, to take the instance given by Lord Justice A. L. Smith in *Rassam* v. *Budge*, 1893, 1 Q.B. on p. 577, a defendant may not plead "to a Statement of Claim, alleging that the defendant had said the plaintiff stole a pair of boots, that what the defendant said was that the plaintiff's footman stole the boots, and that was true."

Again, if the libel complained of be "A said that the plaintiff had been guilty of fraud," it is not enough for the defendant to plead that A said so; that would be a bad plea. He must go further and assert in his pleading and prove at the trial that the plain-

tiff had in fact been guilty of fraud. If he is not prepared to go that length, he must pay money into Court, and urge in mitigation of damages at the trial that A did really say so, and that he, the defendant, was foolish enough to believe him. The fact that the plaintiff never thought it worth his while to sue A, is wholly immaterial; it does not even affect the amount of damages. Each man in turn is liable for his own defamatory words; and the person defamed may sue whom he likes, or sue no one, just as he pleases.

It will be sufficient, however, if the defendant can prove that every imputation contained in the libel is substantially true. A slight inaccuracy as to some detail will not prevent his succeeding, if such inaccuracy in no way alters the character of the imputation. But if the words which the defendant cannot prove to be true are a material aggravation of the main imputation, or insinuate some further charge in addition to it, the plaintiff will be entitled to a verdict. The test always is, Did the libel as published have a different effect on the mind of the reader from that which the actual truth would have produced?

We may illustrate this by contrasting two

cases, in each of which a railway company was defendant. It was too much the practice formerly for railway companies to "gibbet" any one whom they had caught in the act of breaking a by-law, by placarding his name and address on the walls of the station. In the first case, *Alexander* v. *North-Eastern Railway Company*, 34 L.J. Q.B. 152, tried in 1865, the libel complained of was a notice of this kind, which stated that the plaintiff had been convicted of riding in a train for which his ticket was not available, and that he was sentenced to be fined £1, or to three weeks' imprisonment in default of payment. Proof that the plaintiff had been convicted of that offence and had been sentenced to be fined £1, or to a fortnight's imprisonment in default of payment, was held sufficient; for the error of one week could not have made any difference in the effect which the notice complained of would produce on the mind of the public. But a different conclusion was arrived at in the second case, tried three years later, *Gwynn* v. *South-Eastern Railway Company*, 18 L.T. 738. There the plaintiff had been convicted before the Lord Mayor of travelling on the defendants' railway from

London Bridge to Cannon Street without a ticket, and sentenced to a fine of one shilling with costs, or in default three days' imprisonment. The smallness of the fine seems to show that the Lord Mayor had serious doubts as to the guilt of the plaintiff, yet the defendants published placards stating that the plaintiff had been so convicted and fined, and describing the alternative as being "imprisonment *with hard labour*." On this Mr. Gwynn at once sued the company for libel. He contended that the words "imprisonment with hard labour" were not only inaccurate, but that they also conveyed to the mind of the reader a wholly false impression as to the enormity of the offence which the plaintiff had committed. The judge left it to the jury to say whether the defendants' words were really a substantially correct account of the conviction; the jury thought they were not; and as the railway company had thought fit to put the full name and address of the plaintiff in large letters on their placard, and had also set out the words "hard labour" in especially prominent type, the jury awarded the plaintiff £250 damages.

Although a plea of justification will not be

a complete answer to the action, unless it justifies the whole libel, still, the defendant is sometimes allowed, in mitigation of damages, to justify part only, provided such part contains a distinct imputation which can be separated from the rest. So he may sometimes justify as to one portion, and plead privilege or fair comment to the rest, provided the portion justified be fairly severable from the rest. To be fairly severable, it must be intelligible by itself, and must convey a distinct and separate imputation upon the plaintiff (*Davis* v. *Billing*, 1891, 8 Times L.R. 58). Thus, if you say a man is a forger and an uncertificated bankrupt, you may plead that either of these charges is true, though you cannot prove the other; for they are distinct and separate imputations. But I remember an instance in my own practice some years ago, where I availed myself of this rule, though I am afraid that strictly it did not apply. Two fathers were summoned before the same bench of magistrates on the same day. One was charged with not having his child vaccinated, the other with not sending his child to school. Both were fined. The newspaper reporter reported the facts of both

cases quite accurately, but by a blunder he interchanged the names of the parents so that the anti-vaccinator was reported as guilty of not educating his child, while the poor man who could not find the necessary school fees appeared as being fined for not vaccinating his child. Well, the latter father did not seem to mind, but the anti-vaccinator was furious. He commenced an action at once against the editor and proprietor of the paper, claiming damages because he had been misrepresented as a wicked father who did not educate his child; and this, he said, was an offence against the law of the land! I thought the action was a somewhat trumpery one—one in which a little more liberty than usual might perhaps be allowed to the defendant. I pleaded that, except as to the names, the newspaper paragraph was a fair and accurate report of two judicial proceedings; and I paid forty shillings into Court for the blunder as to the name. Counsel on the other side maintained that I had no right to cut the alleged libel up in this way; the sentence being that "A B was charged with such and such an offence," he contended that I could not sever the name A B from the

rest of its sentence, pay money into Court for that and then go on to state that some other person, not A B, had in fact been convicted of the offence alleged. He argued it very forcibly in the Bar-room outside the judge's room at Chambers in the Royal Courts to an admiring audience of the junior Bar, who were waiting for their summonses to come on. He said, "Suppose I wrote and published the words 'Odgers is an ass,' and Odgers here brought his action, could I plead that as to the word 'Odgers' I had made a mistake, but that it was true that Jones was an ass?" Now, if he had argued his case in this way when we got inside the judge's room, I think he would have gained his point; but for some reason—natural delicacy, no doubt—he shrank from giving the learned judge this telling instance. Manisty, J., obviously thought it was queer pleading, but he held that it was allowable under the circumstances and in such a silly action. So he confirmed the Master's order with costs, and the action never came into Court.

Where the plaintiff attempts to give the words a secondary meaning by the aid of an innuendo in his Statement of Claim, the de-

fendant may plead generally that "the words are true in substance and in fact," and that will be taken to mean that he is prepared to prove them true in whatever sense the jury may find to be their proper meaning. Or the defendant may expressly refer to the innuendo, and justify the words either with or without the innuendo—that is, either in their primary or in their secondary meaning, whichever he pleases (*Watkin* v. *Hall*, 1868, L.R. 3 Q.B. 396). But he must be very careful about this. For if he justifies them with the innuendo, the jury will naturally infer that the innuendo is correct, that it expresses what the defendant really meant, and he will have to prove it true "up to the hilt." But if he justifies the words without the innuendo, then he can never say at the trial that the words are true in the secondary sense ascribed to them by the innuendo; and should the jury think that the innuendo assigns to the words their correct meaning, then his plea of justification goes by the board; it becomes an irrelevant plea. The words may be literally true; but that is wholly immaterial, if the jury find that they conveyed to the reader a secondary meaning wholly distinct from their

literal meaning. See *Williams* v. *Smith*, *ante* p. 91. Thus, if I called a trader a "man of straw," that would mean that credit could not safely be given to him; and I should not be allowed to give evidence that he did occasionally deal in hay and straw. Or, take this instance. If Mr. Weller, senior, wrote to his son that "the Rev. Mr. Stiggins drinks," it would be idle for him to prove at the trial that the reverend gentleman occasionally sipped a glass of water, if the jury think that the words impute that he habitually drank intoxicating liquors to excess.

But in all these cases of justifying part only of the words, or of justifying with or without the innuendo, the defendant must always make it quite clear on his pleading or in his particulars how much he intends to try and prove true at the trial, and how much he does not. For the plaintiff is entitled to know, before he comes into Court, precisely what is going to be said against him, so that he may prepare to meet the charge.

IV

PRIVILEGE

In the last lecture we began to consider the defendant's answer to the plaintiff's case. We dealt with the defence that the words are true. To-night we must devote to the defence of privilege.

It is a defence to an action of libel if the words were published on what the law deems a privileged occasion. As a rule, a man is not justified in making defamatory statements about his neighbour which he cannot afterwards prove to be true. But there are occasions, on the other hand, on which it is a man's duty to state his real opinion fully and frankly, without thought or fear of consequences; and these are called privileged occasions. It is always a question of law for the judge—not a question of fact for the jury—whether any particular occasion is privileged or not.

There are occasions on which the necessities of public service or the administration of justice require that the writer should enjoy complete immunity; to these an *absolute* privilege attaches. In such cases, no action is permitted, even though it be alleged that the writer knew his words to be false and wrote them with deliberate spite. There are not many such occasions, and our judges are not inclined to increase the number.

There is, however, a much larger class of occasions on which the privilege is a *qualified* one; occasions on which it is the right or duty of the defendant to state what he honestly believes to be the truth about the plaintiff, but on which the interests of society do not require that he should be freed from all responsibility. In such cases the plaintiff will recover damages in spite of the privilege, if he can prove that the defendant did not act in good faith, but was actuated by some improper motive in writing as he did. This improper motive is called "malice." It is for the defendant to satisfy the judge that the occasion is privileged. When this is done, it is for the plaintiff to prove malice.

In cases of absolute privilege, then, it is

idle for the plaintiff to try and prove malice. The Court, for high reasons of State, declines altogether to entertain the action. Take, for instance, an action against a judge for words spoken on the bench.: no such proceeding will be permitted, whether malice be alleged or not. But if I am asked to give my discharged servant a character by some one who is thinking of taking her into his employ, it is my duty to state what I honestly believe to be the truth about her; hence the occasion is privileged. But if I state what I know is not true about her, because I am angry with her and desire to prevent her getting a good situation, then I am actuated by malice. And such malice, if proved, will destroy the privilege, because it is not absolute. It is only in cases of *qualified* privilege, then, that the plaintiff has to prove malice in order to succeed in his action. It is always useful to prove malice, if you can, in order to enhance the damages; but such evidence is not essential to the cause of action, until the judge rules that the occasion of publication is privileged, and that such privilege is not absolute.

It is true that the word "malicious" is

usually inserted in every definition of a libel, that the pleader invariably introduces it into every Statement of Claim, and that the older cases contain many *dicta* to the effect that "malice is the gist" of an action of libel or slander. But in all these cases the word "malice" is used in a special and technical sense; it denotes merely the absence of any lawful excuse. To say that defamatory words are malicious in that sense simply means that they are not employed under circumstances which excuse them; in fact, that they are not privileged. But this is a very technical, almost a fictitious, use of the word; it is a use which has been termed "unfortunate" by more than one learned judge. I prefer to keep to the popular and ordinary sense of the word. So in these lectures, please note that "malice" is always used to denote some ill-feeling towards the plaintiff or the class to which he belongs, some mean or crooked motive of which an honourable man would be ashamed. This is called "express malice" or "actual malice" in our older books. Using the word in this sense, I say that till the defendant pleads privilege, malice is no part of the issue. As soon as the judge rules that

the occasion is privileged the plaintiff has to prove malice, but not before.

Every lawyer will, I think, admit that the last two sentences accurately state our present law and practice in actions of libel. But at the same time I must admit that they do not state that law and practice quite in the orthodox fashion. There is plenty of authority for my modern way of putting it: but still that modern way is not yet universally accepted and recognised. This is how our older judges and text-book writers would state the same proposition: "Malice is an essential part of the cause of action, and must in every case be alleged, and, if need be, proved. It is not necessary, however, for the plaintiff to prove it in the first instance, because it will be presumed in his favour. The law presumes malice from the publication of defamatory words. But if the occasion be one of qualified privilege then the privilege arising from the occasion rebuts the *prima facie* presumption of malice and renders it necessary for the plaintiff to prove what is no longer presumed in his favour."

Well, this comes to precisely the same thing in the end: it is only a longer and more con-

fusing way of stating the same rule of law. It is confusing, because the word "malice" is used in two entirely different senses. The malice which the law is said to presume from the publication of defamatory words is something quite different from the malice which the plaintiff must prove in order to rebut the defence of privilege. One is "malice in law" —a fiction: the other is malice in fact. Let us forget the fiction and stick to the fact. Now these venerable writers start by stating something which is not the fact. Malice is no part of the plaintiff's *prima facie* case: it is only a reply to a particular defence: in nine cases out of ten the plaintiff never need prove malice. The gist of the action is the injury done to the plaintiff's reputation by the defendant's words. If the defendant's words have in fact injured the reputation of the plaintiff the action lies: qualified privilege, if established, affords a *prima facie* defence to the action; but that defence in turn may be rebutted by proof of malice. But no: these worthies will have it that malice is the gist of the action— which is obviously false. Then, having told that falsehood, they are met with the fact that no plaintiff ever yet was non-suited in an action

of libel because he had not proved malice, except where the occasion was one of qualified privilege; and also with the further fact that in three reported cases[1] the jury expressly found that there was no malice on the part of the defendant, and yet the plaintiff recovered damages. To get over this, they invent another falsehood, that the law presumes malice from the mere fact that the defendant has published words defamatory of the plaintiff. The law presumes nothing of the kind; for it knows that half the libels published are published carelessly, accidentally, inadvertently, or mistakenly, with an entire absence of all malice on the part of the defendant. Take, for instance, the case of *Shepheard* v. *Whitaker*, 1875, L.R. 10 C.P. 502. There the printers of a newspaper made a mistake in setting up in type an announcement copied from the *London Gazette*. They placed the name of the plaintiff's firm under the heading "First Meetings under the Bankruptcy Act" instead of under "Dissolutions of Partnership." An ample apology was inserted in the next issue

[1] *Blackburn* v. *Blackburn*, 1827, 4 Bing. 395; 3 C. & P. 146; *Wenman* v. *Ash*, 1853, 13 C.B. 836, 845; 22 L.J. C.P. 190, 193; *Huntley* v. *Ward*, 1859, 6 C.B. N.S. 514; 1 F. & F. 552.

of the paper; no damage to the plaintiff was proved to have followed; and there was no suggestion of any malice. Yet in an action for libel brought against the proprietor of the paper, the plaintiff recovered £50 damages. And the Court held that the publication was libellous, and that the damages awarded were not excessive. But it is preposterous to say that the law presumed malice in such a case as this. I can only echo Mr. Bumble: "If the law supposes that, the law is an ass!"

You will find just the same random generality in the law of contract. First, it was solemnly laid down that "every contract requires a consideration to support it,"—which is not true. The student discovered promptly numerous covenants which were not supported by any consideration. "Oh yes," came the mendacious reply, "but they are under seal; and a seal imports a consideration." Why any one should suppose that a bit of sealing-wax on the parchment would import a consideration into the transaction, I cannot imagine. You might as well say that a man must have a handsome balance at his bank, because he has a handsome knocker on his front door. It is not the fact that a seal

imports a consideration. If it were, no one could ever make a deed of gift. Suppose a man settled some money on his wife and shortly afterwards became bankrupt, the trustee would try and set the settlement aside, as being voluntary. Could you possibly argue that it was not a voluntary settlement because it was under seal? I should like to see the face of Mr. Justice Vaughan Williams when you told him that the presence of a wafer necessarily imported a good consideration.

Again, I was taught in my youth that there must be *et damnum et injuria* in every action of tort. Is that true? What about *Ashby* v. *White?* Yes, the old books would reply, the rule is true: *Ashby* v. *White* is only an apparent exception; for "every injury imports a damage." Does it? If it does, there was never any necessity to talk about *et damnum et injuria.* It would have been enough to say simply that there must be an *injuria.* But both propositions are untrue: injury does not import damage, any more than a seal imports a consideration: and it is not necessary to prove damage in at least one-third of the actions of tort daily tried in our Courts.

It is just what I was taught as a boy—how one lie leads to another!

Let us get rid of all these antiquated attempts to make our law presume something which is contrary to the obvious facts of the case. The law never presumes actual malice, and that is the only kind of malice worth presuming. Unless the judge rules that the occasion is privileged, no question as to malice is ever left to the jury; the plaintiff will recover damages if he proves that his reputation has been injured by the defendant, whether such injury was malicious or accidental. Should the judge rule that the occasion was absolutely privileged, there is an end of the case; and judgment will pass for the defendant, however malicious he may have been. Should the judge rule that the occasion was one of qualified privilege, then and then only does the issue as to malice arise; in that event, the plaintiff will recover if he can prove malice in the defendant: if he cannot, his action fails.

I. Absolute Privilege

There are not many occasions to which an absolute privilege attaches: nor is it desirable

that there should be many. The judges, as I have said, decline to extend the number (*Proctor* v. *Webster*, 1885, 16 Q.B.D. 112). They may be grouped under three heads :—

(i.) Parliamentary proceedings.
(ii.) Judicial proceedings.
(iii.) Acts of state, naval and military affairs, etc.

(i.) *Parliamentary Proceedings*

It was laid down in the Bill of Rights (1 Wm. & Mary, st. 2, c. 2) that "the freedom of speech, and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament." Hence no member of either House is liable in a court of justice for any words spoken in Parliament (*Dillon* v. *Balfour*, 1887, 20 L.R.Ir. 600; *Fielding and others* v. *Thomas*, 1896, A.C. 600). Any petition to Parliament or to any committee of either House, and all evidence given before any such committee, is absolutely privileged, although it may contain false and defamatory statements. But this privilege did not extend to any publication outside the walls of the House. Hence at common law, even if

the whole House ordered a parliamentary paper which contained libellous matter to be published, no privilege attached. You are all familiar, no doubt, with the celebrated case of *Stockdale* v. *Hansard*. Hansard was the printer and publisher to the House of Commons. That House ordered him to publish a parliamentary paper which contained a serious libel on Mr. Stockdale. Hansard did what the House told him to do, and Stockdale brought his action. The libel was clear, the publication was clear; hence there was no defence to the action. Hansard pleaded, it is true, that the House of Commons had ordered him to publish the paper which contained the libel; but that was no defence. It had been laid down in 1693, more than a century previously, that "the warrant of no man, not even of the King himself, can excuse the doing of an illegal act." Lord Denman held accordingly that the order of the House of Commons afforded Hansard no defence. At this simple statement of clear law the House of Commons took grave offence. They treated the action as a contempt of the House of Commons, and they carried their vengeance to an absurd extent. They could not send Lord

Denman to the Tower, though he was the main offender; but Stockdale, his attorney, the process-server, and eventually the two Sheriffs of London, were soon lodged in prison. Sir William Follett, Sir E. Sugden, Mr. Pemberton, and all the lawyers in the House, except the Attorney-General, assured them they were wrong, but the House of Commons would not listen to reason. At last, better counsels prevailed, and an Act of Parliament was eventually brought in and passed—the 3 & 4 Victoriæ c. 9,—which protects all parliamentary papers published by the authority of either House.

(ii.) *Judicial Proceedings*

No action lies against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceedings before any Court recognised by law. All pleadings and affidavits are absolutely privileged, so long as they are presented to a Court that has power to entertain the proceedings. If the proceedings be taken before a Court which has no jurisdiction in the matter, or if they be taken before a body which is not a Court at all, there is of

course no privilege. You will remember that this point was raised in the action which the managers of the Royal Aquarium brought against Mr. Parkinson, a member of the London County Council. He was a gentleman who was not, I gather, in the habit of attending music halls; and I think he must have been a little short-sighted. Anyhow, he honestly believed that he saw something which nobody else saw, and which did not in fact take place. He was also, it appears, not a judge of Japanese costumes; he did not know how to distinguish the male from the female attire of that country. But though not a judge of this, he contended that on the London County Council he was a judge, and that his speech on the subject which was being discussed before the County Council was his judgment, and as such was absolutely privileged. But the Court held that he was no judge; that when the London County Council is disposing of applications for music and dancing licenses it is acting as an administrative and not a judicial body. Such places of entertainment are illegal, unless the county authorities grant them a license; and the granting or the refusal of such a license is not an adjudication

on the rights of the parties, it is merely a part of the discipline and management and the police regulation of the metropolis. It is clear, too, from sub-section 2 of section 78 of the Local Government Act, 1888, that no judicial powers were transferred to the London County Council. Hence that august body is not a Court; and speeches made by members at its meetings have only a qualified, and not an absolute, privilege; and so Mr. Parkinson lost the action and had to pay £250 damages (*Royal Aquarium, etc., Society* v. *Parkinson*, 1892, 1 Q.B. 431).

(iii.) *Acts of State, etc.*

It is not competent to a civil court to entertain a suit in respect of a communication made by one official of State to another in the course of his official duty, or to inquire whether or not he acted maliciously in making it. A similar privilege extends to all acts of State, and to the official notification of such acts in the *London Gazette;* to all State papers; and to all advice given to the Crown by its ministers or ambassadors. It is contrary to public policy to have such matters canvassed in the public courts of law.

II. Qualified Privilege

We pass next to cases of qualified privilege. We must leave the discussion of Privileged Reports till my next lecture; but we can deal to-night with the ordinary cases of privilege which arise from Duty and Common Interest.

And here we have the advantage of having a clear rule or canon laid down for us by Lord Campbell, C.J., in *Harrison* v. *Bush*, 1855, 5 E. & B. at pp. 348, 349. It is as follows:—

> "A communication made *bona fide* upon any subject-matter, in which the party communicating has an *interest* or in reference to which he has a *duty*, is privileged, if made to a person having a corresponding *interest* or *duty*. And the word 'duty' cannot be confined to legal duties, which may be enforced by indictment, action, or *mandamus*, but must include moral and social duties of imperfect obligation."

Both parties, you observe, must have either an interest in the subject-matter of the communication or some duty to discharge in connection with it. The law does not protect idle gossip or officious interference in other persons' affairs. It must be the defendant's duty, or it must be to his interest, to write as he does; and moreover the person to whom he

writes must have either some duty to perform in the matter or some legitimate interest in the subject of the libel. The duty, as Lord Campbell says, need not be one which would be enforced in a court of law; a social or moral duty will be sufficient. So, too, the interest need not necessarily be pecuniary. On the other hand, mere curiosity is not sufficient. It must be an interest which the law recognises and approves.

Let us examine more in detail the working of this rule.

1. In the first place, all answers to confidential inquiries are privileged. "If a person who is thinking of dealing with another in any matter of business asks a question about his character from some one who has means of knowledge, it is for the interests of society that the question should be answered; and the answer is a privileged communication" (*per* Brett, L.J., in *Waller* v. *Loch*, 1881, 7 Q.B.D. 622). The commonest instance of this is the 'character' of a servant. As I have already stated (*ante*, p. 109), if a lady is asked as to the capabilities and character of a servant formerly in her employ by any one who has a right to ask the question, it is the

lady's duty to state fully and frankly her honest opinion of the former servant, whether it tell in her favour or not. The same rule applies whenever a confidential inquiry is made—say, as to the solvency of a tradesman, or as to the competency and skill of a professional man. If the person inquiring has a legitimate interest in obtaining the information, it is the duty of those to whom he applies to give him a direct and honest answer to his question. So here is that necessary concurrence of duty and interest which creates a privilege. There must be some good reason for the question; the reply must be given seriously and honestly: it must be a relevant answer to the question, and not branch out into immaterial matters. Subject to these limitations, "every one owes it as a duty to his fellow-men to state what he knows about a person when inquiry is made" (*per* Grove, J., in *Robshaw* v. *Smith*, 38 L.T. 423).

2. *Communications volunteered.*—So long as the communication is made in answer to a previous inquiry by a person interested, the case presents little difficulty. But there are cases in which it becomes a man's duty to go of his own accord to his neighbour, or even to

a stranger, and give him certain information unasked. As a rule, no doubt, the safer course is to wait till you are applied to; but life or property may be in imminent and obvious peril, or there may be other circumstances which make it clearly the duty of a good citizen to go at once to the person most concerned and tell him everything, without waiting for him to come and inquire. It may well be that he has no suspicions, and never would inquire into the matter unless warned.

In what cases, then, is it your duty, at the risk of appearing officious and meddlesome, to come to me and tell me something which it concerns me to know?

Well, clearly, it is your duty to do this, whenever a confidential relationship exists between us — whenever I repose trust and confidence in you, and could justly blame you if you remained silent. Such a confidential relationship exists between husband and wife, father and son, brother and sister, guardian and ward, master and servant, principal and agent, solicitor and client, partners, or even intimate friends. Thus it is clearly the duty of my steward, bailiff, foreman, or

housekeeper to whom I have entrusted the management of my lands, business, or house, to inform me if they know that anything is going wrong, and not to wait till my own suspicions are aroused, and I myself begin asking questions. So my family solicitor may voluntarily write and inform me of anything which he thinks it is to my advantage to know, without waiting for me to come down to his office and inquire. But it would be dangerous for another solicitor, whom I had never employed, to volunteer the same information; for till I retain him in the matter, there is no confidential relation existing between us. So a father, guardian, or an intimate friend may warn a young man against associating with a particular individual; or may warn a lady not to marry a particular suitor; though in the same circumstances it might not be the duty of a mere stranger to give such a warning. So, if the defendant is in the army, or in a Government office, it would be his duty to inform his official superiors of any serious misconduct on the part of his subordinates; for the defendant is in some degree answerable for the faults of those immediately under his control. But it does not follow that, if A and

B are officers or clerks of equal rank and standing, it is the duty of A to tell tales of B, except in self-defence; for A's superiors expect him to do his own work merely, and have not invested him with any authority or control over B.

It is where there is no such relationship, where no such confidence is reposed, that the difficulties arise which have sadly puzzled our judges. It is all very well for Chremes to say, "*Humanum nihil a me alienum puto.*" But the law does not sanction so extensive an interest in other persons' concerns. A universal busybody, however well-meaning, will certainly get himself into trouble. Still no one is bound to sit silent and see a crime committed under his nose. Take this case. A housemaid has honestly come to the conclusion that the cook is robbing their master. She has some grounds for suspicion—grounds which appear to her sufficient; but she has no positive proof. What ought she to do? She feels that she cannot conscientiously allow her master to remain in blissful ignorance of what is going on. But if she speaks, the cook will probably lose her place. The master may not take the trouble to investigate the matter;

but will just dismiss the cook, who all the time may still be innocent.

This clearly is a question rather of morality than of law. And the answer must depend on the facts which the girl regards as suspicious—are they strong enough to make it her duty to tell her master?—a difficult question for a housemaid to decide. The only rule of law applicable to such a case is that laid down by Blackburn, J., in *Davies* v. *Snead*, 1870, L.R. 5 Q.B. at p. 611:—"Where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he *bona fide* and without malice does tell them, it is a privileged communication."

But it is often difficult to apply this rule. Take, for instance, this case on which our judges have frequently differed in opinion. If I learn that one of my tradesmen is about to supply goods on credit to a man whom I reasonably believe to be practically insolvent, may I warn him not to do so? Is it right, in the interests of society, that I should tell him what I know, or am I to stand by and see him lose his money? In the days of Elizabeth, it was considered clear law that no action would

lie for such a caution if it were given as "good counsel" (*Vanspike* v. *Cleyson*, 1597, Cro. Eliz. 541). So it was in the days of George III. (*Herver* v. *Dawson*, 1765, B.N.P. 8). But in 1838 Lord Abinger, C.B., held that such a communication should not be volunteered; the defendant must wait till the tradesman applies to him for advice. "If the defendant had been asked by Mr. Butler as to the plaintiff, and had said what he did without malice, no action would have been maintainable; but as he made the communication without being asked in any way to do so, he is liable in this action, if the words reflect on the character of the plaintiff as a tradesman" (*King* v. *Watts*, 8 C. & P. at p. 615). And in *Bennett* v. *Deacon*, 1846, 2 C.B. 628, the Court of Common Pleas was equally divided on this question. How our present Court of Appeal would decide the point I cannot say for certain. But I venture to think that it would follow the judgments of Tindal, C.J., and Erle, J., rather than those of Coltman and Cresswell, JJ., and hold that such a caution was *prima facie* privileged.

In *Coxhead* v. *Richards*, 1846, 2 C.B. 569, the same Court was equally divided on a

very similar question, whether a disinterested third person may inform the owner of a ship that his captain has been guilty of gross misconduct at sea. Here again, I think the view taken by Tindal, C.J., and Erle, J., would probably prevail in the present day.

And quite recently there has been a similar difference of opinion among our judges over the case of Mr. Stanley's valet (*Stuart* v. *Bell*, 1891, 2 Q.B. 341). There the plaintiff was the valet of Mr. H. M. Stanley. They both stayed for some days in Edinburgh at the Waterloo Hotel; then they went to Newcastle-on-Tyne, where they were entertained at the Mansion House by the defendant, who was Mayor of Newcastle. While they were there, the chief constable of Newcastle received from the chief constable of Edinburgh a letter stating that a lady's gold watch and chain had been stolen at the Waterloo Hotel, and that suspicion had fallen on the plaintiff. This he at once showed to the Mayor, who did nothing for a few days, but just before Mr. Stanley left Newcastle he told him privately the purport of the letter. And Mr. Stanley, after thinking it over for a day or two, dismissed the plaintiff, who in consequence sued

the Mayor for damages. The case came on for trial at the Leeds Summer Assizes, 1890, before Mr. Justice Wills, who held that the occasion was not privileged, and the plaintiff recovered £250 damages. But the defendant appealed. In the Court of Appeal Lord Justice Lopes agreed with Mr. Justice Wills; but the other members of the Court took the opposite view that the occasion was privileged. And so the verdict was set aside, and judgment entered for the defendant.

Alas for the poor housemaid in the case I gave just now, who has no access to the Law Reports, but who must settle for herself by the light of nature these vexed questions on which eminent judges differ!

3. *Publications made to protect the defendant's own interests.* — There is less difficulty in the cases where the defendant has an interest in the subject-matter of the communication, and the person to whom the communication is made has some duty to perform in the matter. For instance, if the housemaid did tell the master, it would clearly be his duty to hear what the cook had to say in her defence, and it would be the interest of the cook to defend

herself: hence all she said to her master would be privileged. So if I have reason to complain of the incivility of a guard or a porter, I may write to the railway company. If my letters go wrong, I may complain to the Postmaster-General. In short, all communications made in self-defence to protect the defendant's private interests or to answer some attack made by the plaintiff, are privileged (*Blackham* v. *Pugh*, 2 C.B. 611; *Laughton* v. *Bishop of Sodor and Man*, 1872, L.R. 4 P.C. 495). Any one who honestly believes he has a grievance is entitled to seek redress in the proper quarter.

But he must apply to a person who has some duty or interest in the matter. It is not sufficient that the defendant honestly believed that such person had jurisdiction. This is the point recently decided in the case of *Hebditch* v. *MacIlwaine*, 1894, 2 Q.B. 54. There the plaintiff aspired to be a Guardian of the Poor for his native village, South Petherton, in Somerset. His ambition was gratified; he was elected. He proudly attended the first meeting of the new Board. There to his dismay the Clerk at an early stage of the proceedings read out a letter

addressed to the Board by certain residents in South Petherton, alleging that the plaintiff had obtained his seat by tampering with voting papers, and treating the electors with cider. Now a Board of Guardians has no jurisdiction in such matters: it cannot try an election petition or punish a candidate for illegal practices. The defendants of course had an interest in having the election in their own parish properly conducted: but the Guardians to whom they addressed their complaint belonged to other parishes, and had neither interest nor duty in the matter. The jury found in favour of the defendants that they honestly and reasonably believed that the Board of Guardians had jurisdiction, and was consequently the proper authority to whom to apply. But the Court of Appeal held that finding to be immaterial. The fact was that the Board had no jurisdiction and was not the proper authority to whom to apply; and that fact destroyed the claim of privilege.

4. *Common Interest.*—Whenever two or more persons have a legitimate interest in the same matter, all communications passing between them with reference to that matter are

privileged. Such common interest is generally a pecuniary one, such as two shareholders in the same company, or two creditors of the same debtor, possess. But it may also be professional, as in the case of two officers in the same corps, or masters in the same school, anxious to preserve the dignity and reputation of the body to which they both belong. In short, it may be any interest arising from the joint exercise of any legal right or privilege, or from the joint performance of any duty imposed or recognised by the law. Thus two executors of the same will, two trustees of the same settlement, have a common interest, though not a pecuniary one, in the management of the trust estate. So the ratepayers of a parish have a common interest in the selection of fit and proper officers to serve in the parish, their salary being paid out of the rates. So relations by blood or marriage have a common interest in their family concerns. But beyond this there is no privilege. The "common interest" must be one which the law recognises and appreciates. No privilege attaches to gossip, however interesting it may be to both speaker and hearers. If, in fact, the defendant had no

other interest in the matter beyond that which any other educated person would naturally feel, interference on his part would be officious and unprivileged.

Take, for instance, the case of *Botterill and another* v. *Whytehead*, 1879, 41 L.T. 588. The plaintiff there was an architect, and had been selected by a committee to superintend and carry out the restoration of Skirlaugh Church. The defendant was a clergyman residing in the county, but he was neither the patron nor the incumbent of the church, nor a member of the committee appointed to effect its restoration. He was not a parishioner of Skirlaugh; and it did not appear that he was even a subscriber to the restoration fund. Still he took it upon himself to write a letter to a member of the committee, saying, "I see that the restoration of Skirlaugh Church has fallen into the hands of an architect, who is a Wesleyan, and can have no experience in church work. Can you not do something to avert the irreparable loss which must be caused if any of the masonry of this ancient gem of art be ignorantly tampered with?" The letter was clearly a libel on the plaintiff in the way of his profession or calling. Kelly, C.B., on

a motion for a new trial, declared that he was "at a loss to see what privilege the defendant possessed, under the circumstances of the case, to interfere between the committee and the plaintiff in respect of the contract between them."

Again, a clergyman or parish priest has no right in the course of a sermon to "make an example" of a member of his flock, by commenting on his misconduct, and either naming him or alluding to him in unmistakable terms. If he does so, his words will not be privileged, although uttered in the honest desire to reform the culprit and to warn the rest of his hearers. It is quite possible that the congregation would feel more interest in this part of the discourse than in any other; but that will not create any privilege: they do not come to church to listen to attacks on their neighbours (*Magrath* v. *Finn*, 1877, Ir.R. 11 C.L. 152).

Many other instances might be given of occasions to which the law attaches a qualified privilege. But the general rule is clear. Both the defendant and the person with whom he communicates must have either an interest in the subject-matter of the communication or

some duty to discharge in connection with it; otherwise there is no privilege. And even where there is such a privilege, the plaintiff can destroy it by proving that the defendant was actuated by malice.

V

PRIVILEGED REPORTS, ETC.

IN my last lecture I dealt with those cases of qualified privilege in which both the defendant and the person to whom he writes have either an interest in the subject-matter of the communication, or some duty to discharge in connection with it. To-night I propose to discuss the privilege which attaches to certain reports.

A very large portion of every newspaper consists of reports—reports of trials, reports of debates in Parliament or in a Vestry or a County Council, reports of public meetings. And if the speakers at all such gatherings always confined their remarks to matters of public interest, and commented only on admitted facts instead of inventing facts for comment, the proprietors of these newspapers would run no risk. But suppose that a speaker on one of these occasions exceeds the limits of

a fair comment, and attacks my private life, and makes statements about me which are untrue, ought these statements to be reported in the public press, so that all my friends may gloat over them at breakfast-time the next morning? If they are so reported, should I not have a right of action against the newspaper for the injury thus done to my reputation?

Well, you may say, I could sue the speaker; he is most to blame. Perhaps I could; perhaps I could not. The words may not be actionable when spoken, though they are libellous when printed; or the original utterance may have been privileged by reason of the occasion. Anyhow, I am not bound to sue the speaker; he may not be "worth powder and shot." If he were liable and worth suing, I could sue him and the paper as well. And whether he is liable or not, whether he is worth suing or not, are questions which should not affect, and which never as a matter of law have been allowed to affect, my right to sue the paper.

For, after all, it is the republication in the newspaper which seriously injures the reputation of the person attacked at such a meeting.

The consequences of reporting in the local paper calumnies uttered at some political or parish meeting may be very serious. The meeting may have been thinly attended, and the audience may have known that the speaker was not worthy of credit; it was the newspaper that printed and published the falsehood to all the world. Charges recklessly made in the excitement of the moment are thus diffused throughout the country, and remain recorded in a permanent form against a perfectly innocent person. No one can tell into whose hands a copy of that newspaper may come. Moreover, additional importance and weight is given to such calumny by its republication in the columns of a respectable paper. Many people will believe it merely because it is in print. There is, in fact, as I pointed out in my first lecture (*ante*, p. 4), an immense difference between the injury done by such a slander and that caused by its extended circulation by the press; and many a jury has awarded substantial damages against the newspaper under such circumstances.

At common law (*i.e.* apart from any legislation on the subject) an action lies against every one who reports or repeats defamatory

words, as well as against the man who invented the falsehood and first set it in circulation. For by repeating the tale the defendant has practically endorsed it, he has given it increased weight and credit, and started it on a fresh career of mischief. It is no defence, then, to an action of libel for the person sued to prove that he did not himself concoct the story but had heard it from another. And it makes no difference whatever in law that the defamatory words are preluded with such phrases as "We hear," or "We are creditably informed," or "We have it on the best authority that," etc. Such phrases will not prevent or diminish your liability. There is one slight exception: if, when reporting defamatory words, you name your authority—"Brown tells me so and so"—then you may give evidence to show that Brown did in fact tell you so, but in mitigation of damages only, not as any defence to the action.

This is a sensible and useful rule of law, but it must not be too strictly applied. It is clear that there must be some exceptions made to it; for instance, it is for the public good that the proceedings in Parliament and in the Law Courts should be fully known and

accurately reported, even though defamatory statements concerning individuals should thereby receive a wider circulation. Accordingly there were at common law (before any statutes were passed on the subject) two exceptions to the rule stated above. Reports of all judicial and parliamentary proceedings were privileged.

(*a*) *Reports of Judicial Proceedings*

A fair and accurate report of any proceeding in a public court of law is privileged. Of course, the report need not be verbatim; it may be abridged or condensed, but it must not be partial or garbled. In olden times papers were expected to reserve all report of a case till the trial was ended, but now it is clear that reports may be published of the proceedings day by day, provided the whole trial is fairly reported sooner or later. It is not necessary to state all that occurred *in extenso;* but if any fact be omitted which would have told in the plaintiff's favour, while other facts, perhaps, which tell against him are stated in full, it will be a question for the jury how far the omission is material,

and whether such deviation from absolute accuracy makes the report unfair.

The jury, in considering the question, should not dwell too much on isolated passages; they should consider the report as a whole. They should ask themselves what impression would be made on the mind of an unprejudiced reader who reads the report straight through, knowing nothing about the case beforehand. Slight errors may easily occur; and if such errors do not substantially alter the impression of the matter which the ordinary reader would receive, the jury should find for the defendant. If, however, there is a substantial misstatement of any material fact, and such misstatement is prejudicial to the reputation of the plaintiff, then the report is unfair and inaccurate, and the jury should find for the plaintiff. Thus, the entire suppression of the evidence of one witness may render the report unfair. See *Rumney* v. *Walter*, 1892, 8 Times L.R. 256.

The reporter should always report the sworn testimony of the witnesses rather than the speeches of counsel, who are often instructed to open to the jury facts which they subsequently fail to prove. He should re-

cord fully the summing up of the learned judge, which is often in itself a fair summary of the whole case. The reporter must confine himself to reporting what really occurred in open court. He must not pick up and print private gossip about the case. He must not hint mysteriously at evidence which *might* have been given and was not. In one case (*R.* v. *Gray*, 26 J.P. 663) a reporter was convicted and fined £50 for adding after a report of some proceeding before a coroner a sensational paragraph commencing, "From inquiries made by our reporter, it appears that," etc., whereas he really had made no inquiries at all, but had merely copied out some startling statements from an affidavit lent him by the solicitor's clerk, which had not been put in evidence before the coroner. The reporter must not add any comments, or, indeed, anything of his own. His duty is to reproduce precisely what happened at the trial, so as to put those who were not present as much as possible in the position of those who were. He must not state his opinion of the conduct of the parties or discuss their motives; for no privilege will attach to these remarks. Such comments may perhaps be justifiable on

another ground, that they are fair and *bona fide* criticism on a matter of public interest. But, if so, they should not be mixed up with the history of the case, but should be put in the form of a short leading article; and they must not be published till the trial is over. Again, all sensational headings to reports should be avoided. Thus, where the *Observer* published a fair and correct account of certain legal proceedings, headed, "Shameful conduct of an attorney," the attorney recovered damages for the heading. So where a similar report was headed, "How Lawyer B. treats his clients," the judge held that this amounted to a charge that Lawyer B. *generally* treated his clients as this particular client had been treated, and the defendant had to apologise and pay costs.

Such reports are not absolutely privileged. If the plaintiff can prove that the reporter or the newspaper proprietor (whichever he has made defendant) published the report, not in the ordinary course of his duties as a journalist, but out of express malice and spite against the plaintiff, then he will be entitled to recover damages. If, for instance, one of the parties to the action or his solicitor sent such

a report to the papers, the party or his solicitor (*not* the newspaper) would be liable to pay damages, if the jury thought this was done maliciously (*Stevens* v. *Sampson*, 5 Ex. D. 53). So again, if a newspaper published every day during an election a fair and accurate report of a trial that had taken place, say ten years ago, in which one of the candidates cut a disgraceful figure, here, too, it would be open to the jury to find malice. But it is very seldom that such cases occur.

There are, moreover, two cases in which reports of judicial proceedings, although fair and accurate, are not privileged, and are indeed illegal. The first is where the Court has itself prohibited the publication, as it frequently did in former days. Every Court has the power of preventing the publication of its proceedings pending litigation. But such a prohibition is now rare. The second is where the subject-matter of the trial is an obscene or blasphemous libel, or where for any other reason the proceedings are unfit for publication. It is a criminal offence to publish even a fair and accurate report of such proceedings.

But except in these two cases, all proceed-

ings which are in their nature judicial may be fully reported, even though they are *ex parte* (*i.e.* even though one side only is represented on the application). This was decided in *Usill* v. *Hales*, 3 C.P.D. 319, where the *Daily News* reported an *ex parte* application made to a police magistrate under the Masters' and Workmen's Act. A similar question arose quite recently in *Kimber* v. *The Press Association* (8 Times L.R. 671). There the plaintiff, a respectable London solicitor, was reading his evening paper as he travelled home to dinner by the Metropolitan Railway, and suddenly came on a short paragraph in which his name and address appeared, stating (quite accurately, as he learnt afterwards) that an application had been made against him at Canterbury, behind his back and without his knowledge, for a summons charging him with perjury. Such applications are usually heard in private, and with closed doors. But in this case no order was made by the magistrates excluding the public. As a matter of fact, however, the only persons present at the making of the application were the magistrates, their clerk, and his assistant, the applicant, his solicitor and counsel, and the editor

of the two local newspapers. No attempt was made to exclude this editor or to prevent his taking a note of the proceedings for publication. On the hearing of the summons at a later date, the charge was dismissed with costs, without the plaintiff being called on for his defence; and the defendants published a full report of this acquittal in the same evening papers. On these facts it was held by Mr. Justice Hawkins, on 29th June 1892, that there was no evidence to go to the jury, and the plaintiff was accordingly non-suited. And this decision was subsequently upheld in the Court of Appeal, 1893, 1 Q.B. 65; 62 L.J. Q.B. 152.

(*b*) *Reports of Parliamentary Proceedings*

Every fair and accurate report of any proceeding in either House of Parliament is privileged, even though it contains matter defamatory of an individual. The analogy between such reports and those of legal proceedings is now complete; and precisely the same questions must be left to the jury in both cases. There was for a long time great doubt on this subject, but in 1868 the law was clearly

and satisfactorily settled by the decision in *Wason* v. *Walter*, L.R. 4 Q.B. 73. The doubt was caused by the fact that there were Standing Orders of both Houses of Parliament prohibiting all such reports; and it was argued with some force that no privilege could attach to anything which was published in contravention of such Standing Orders and which was therefore in itself a contempt of the House. We have seen that when a learned judge expressly prohibits the publication of the proceedings before him, any report of them is a contempt and wholly unprivileged. And the earliest reports of parliamentary proceedings were only published in fear and trembling as "Debates in the Senate of Lilliput," with the names of the speakers disguised. Cave, the editor of the *Gentleman's Magazine*, "had interest" with the doorkeepers of each House, and could thus gain admittance for himself and his assistants. They took down the names of the successive speakers, the order in which they rose, and short notes of their arguments. This information they brought to Dr. Johnson, who was waiting for it in a garret in Exeter Street, and from such slender materials he

composed the reports which appeared in the *Gentleman's Magazine*. He himself was never inside the House but once. And I am afraid he allowed his political prejudices a little to colour what he wrote; he "took care that the Whig dogs should not have the best of it." You cannot rely on the absolute accuracy of these reports. But even for such reports Cave was cited before the House of Lords for breach of privilege in April 1747; and all reports of parliamentary proceedings ceased for a while. But in 1749 Cave took heart again, and his reports now took the form of letters from an M.P. to a friend in the country. After 1752 they were avowedly printed as reports; but still only the initials of the speakers were given. As late as 1801 the printer and publisher of the *Morning Herald* was committed to the custody of Black Rod for publishing an account of a debate in the House of Lords; but then such account was expressly declared to be "a scandalous misrepresentation" of what had really occurred. And the Standing Orders gradually became obsolete. Still they were not revoked. And twice in this century Parliament has rejected measures by which it was

proposed to confer privilege on reports of its proceedings. In 1843 Lord Campbell introduced into the House of Lords his famous Libel Bill, which now stands in the statute book as 6 & 7 Vict. c. 96. By clause 7 of that Bill he proposed to enact that no legal proceeding, civil or criminal, should be maintainable for a faithful report of any proceedings in either House of Parliament at which strangers had been permitted to be present. Lord Brougham opposed this clause, and eventually it was struck out. Again, in 1858, after the decision in *Davison* v. *Duncan* (see *post*, p. 154), Lord Campbell introduced another Bill into the House of Lords by which he proposed to protect fair reports of certain public meetings, and also all faithful reports of parliamentary debates at which strangers had been permitted to be present. Lord Cranworth supported the proposal; but Lords Lyndhurst, Wensleydale, and Chelmsford opposed it, and the Bill was thrown out.

Then in 1867 began the famous case of *Wason* v. *Walter*. Mr. Wason, the plaintiff, had induced Earl Russell to present to the House of Lords a petition, charging the

newly-appointed Lord Chief Baron with having, thirty years before, made a statement false to his own knowledge, in order to deceive a committee of the House of Commons, and praying for inquiry and the removal of that eminent judge from his office if the charge was found to be true. The presentation of this petition on the evening of 12th February 1867 led of course to a stirring debate, in which the charge made against Sir Fitzroy Kelly was entirely refuted, and some very severe observations were made about the plaintiff's conduct. These were of course reported in the *Times* next morning. And then the very man who by his own act had caused the discussion, brought an action against the *Times* for reporting accurately what the Lords had said about the matter, into which he had prayed them to inquire. It was a monstrous and a vexatious action; but it led to the welcome decision that reports of parliamentary proceedings stand on the same footing as reports of judicial proceedings, and are privileged to the same extent; the advantage of such publicity to the community at large outweighing any injury to a private individual which may result from the publication. And

in the very valuable and interesting judgment delivered by Sir Alexander Cockburn, C.J., occurs this passage :—

"Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied. Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognised. Comments on government, on ministers and officers of State, on members of both Houses of Parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change?"

Well, it was a strong decision, especially when we remember that Parliament had twice refused to make the change themselves. Everybody welcomed the decision. I myself rejoice at it. But I doubt whether the Court had strictly the power so to decide. It is a very

strange thing that no one till then was aware that such reports were privileged at common law, and that so many eminent judges had thought the contrary! It is true that there was no express decision on the point. Still it was a bold step to take. It was judge-made law. And I venture to think that such a change should be made by the Legislature, and not by the judges—as indeed has been done in the analogous case of reports of public meetings. You may praise the "elasticity" of our "system of unwritten law": but I for one hope to see the law of England codified before I die.

(c) *Reports of Public Meetings, etc.*

Fair and accurate reports of judicial and parliamentary proceedings, then, are protected. But at common law no other reports were privileged. This was decided in two important cases—*Davison* v. *Duncan*, 1857, 7 E. & B. 229, and *Popham* v. *Pickburn*, 1862, 7 H. & N. 891. Hence, if a newspaper published an accurate report of a speech made at a political meeting, or at the meeting of any Vestry or Board of Guardians, the proprietor was liable in damages if that speech

contained defamatory matter which he could not prove to be literally true. No privilege at all attached to any report of the proceedings at such a meeting.

Attention was called to this state of the law by the case of *Purcell* v. *Sowler*, which was decided in the Court of Appeal in February 1877. The defendant was the proprietor of the *Manchester Courier*, and he had published a report, which was admitted to be accurate, of the proceedings at a meeting of the Board of Guardians for the Altrincham Poor Law Union. At that meeting serious charges were made against the plaintiff, who was the medical officer of the Union Workhouse at Knutsford, of neglecting his duties, and refusing to attend pauper patients when called for. These charges proved to be utterly unfounded; and they were made in the absence of the plaintiff, without any notice having been given him. Mr. Sowler's defence was that the matter was one of public interest, and that it was his duty to report what actually occurred at that meeting for the information of the ratepayers. The jury, however, found a verdict for the plaintiff for forty shillings, which carried costs. Mr. Sowler appealed. The Court of Appeal held

in his favour that the administration of the poor law and the treatment of the paupers, in each union district, was clearly a matter of public interest in that locality. But it also held that as the plaintiff was absent, and had had no notice of the charges made against him, the Board of Guardians ought not to have discussed the matter at that meeting, or at all events not while reporters were present in the room; and that though they had permitted reporters to remain during the discussion, still the editor, when reading over the report, ought to have exercised his discretion, and struck this portion out of the report, for it was obviously unfair to the plaintiff that such *ex parte* statements should be published in the local papers. And so the verdict was upheld (2 C.P.D. 215).

This case created considerable consternation in the newspaper world. Here was a report, which was admitted to be accurate, of a discussion that had taken place on a matter of public interest at a meeting of a public body, and yet the proprietor of the newspaper must pay damages, because the editor had not cut out certain passages which in the opinion of the Court should not have been published. It is

true that the attack made on the plaintiff proved to be wholly unfounded; but then the public ought to be informed that their representatives do make unfounded attacks. Proprietors of newspapers always contend, as Mr. Sowler did in this very case, that in the hurry of setting up the type for a daily paper it is practically impossible for the editor to read through the copy and weigh each word it contains; that he cannot be expected to edit the report of a public meeting and cut out passages which relate to matters of public interest, so as to make the report incomplete; that so long as the meeting is one that ought to be reported, and the report printed is fairly accurate, nothing more can be required. But this is a view which the Legislature and the law courts have, so far, steadily refused to adopt; and the editor of a paper must edit the whole paper or his employers must take the consequences.

Recourse was had to the Legislature. In 1881 Mr. Hutchison introduced a Bill into the House of Commons, which passed hurriedly through both Houses, without any adequate discussion in either; it received the Royal assent on 27th August 1881, and so became

The Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60). It contained some valuable clauses. It created a system of registration by which the public can generally ascertain for a shilling at Somerset House who is responsible for any libel that has appeared in a newspaper. And the second section of this Act (since repealed) conferred a privilege, but a very limited privilege, on fair and accurate reports of certain public meetings. This is the section:

"Any report published in any newspaper of the proceedings of a public meeting shall be privileged, if such meeting was lawfully convened for a lawful purpose and open to the public, and if such report was fair and accurate, and published without malice, and if the publication of the matter complained of was for the public benefit; provided always, that the protection intended to be afforded by this section shall not be available as a defence in any proceeding, if the plaintiff or prosecutor can show that the defendant has refused to insert in the newspaper in which the report containing the matter complained of appeared a reasonable letter or statement of explanation or contradiction by or on behalf of such plaintiff or prosecutor."

You will see at once that the privilege created by this section was very cautiously guarded. To bring himself within its protection the proprietor or editor of a newspaper

had to prove not only that the meeting was "a public meeting" "lawfully convened for a lawful purpose and open to the public," and that the report was "fair and accurate, and published without malice," but also that the publication *of the matter complained of* was for the public benefit. It was this proviso which rendered this section practically nugatory. It was not enough for the defendant to prove that the meeting was of such a kind that its proceedings ought to be reported; the defendant had to satisfy the jury that it was for the public benefit that the libellous words complained of should have appeared in that report. If the jury thought the report would have been as beneficial to the public without the libellous words as with them, all privilege was lost.

The *Manchester Courier* was again to the fore. It reported a speech made at a public election-meeting held at Manchester in October 1885, in the course of which a speaker made a most serious charge against a Manchester gentleman, who was then a candidate, not for any division of Manchester, but for a constituency 200 miles away. The editor, in spite of the decision in *Purcell* v. *Sowler*,

allowed a full report of this speech to appear the next morning, though, of course, the gentleman libelled was not present at the meeting, and had had no notice of the attack that was going to be made against him. The Court held, on 11th December 1886, that the defendant could claim no privilege unless the jury found as a fact that it was for the public benefit that the actual libel complained of should be published broadcast and read at every Manchester breakfast-table (*Pankhurst* v. *Sowler*, 3 Times L.R. 193).

This decision gave great dissatisfaction to the Press, as it was again laid down that it is absolutely necessary for an editor to edit a report of a public meeting just as he would a letter from a private correspondent. In other words, the editor must not rely on the known accuracy of his reporter; he must read through the report and exercise his discretion as before. For it clearly is not for the public benefit that every word uttered at every public meeting should be printed and widely disseminated. For instance, if anything seditious, blasphemous, or obscene be uttered there, that must be omitted from the report. Similarly, if anything defamatory be said of a

private citizen, not a public man, the passage must be excised from the report before publication. So, too, if an unfair attack be made on a public man. And the editor must decide for himself, before going to press, whether any such attack is fair or unfair.

This, no doubt, imposes on the editor an arduous task, and subjects the proprietor of the paper to serious risk. So Mr. Sowler and his friends again approached the Legislature. On 10th February 1888, Sir Algernon Borthwick, the Chairman of the Newspaper Press Fund (now Lord Glenesk), brought in a Bill which was thoroughly discussed in both Houses of Parliament. Very important amendments and additions were made. The great battle was over section 4, the one relating to the reports of public meetings, which ultimately became law as follows :—

"A fair and accurate report published in any newspaper of the proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above-mentioned bodies, or of any meeting of any commissioners authorised to act by letters patent, Act of Parliament, warrant under

the Royal Sign Manual, or other lawful warrant or authority, select committees of either House of Parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication at the request of any Government office or department, officer of state, commissioner of police, or chief constable, of any notice or report issued by them for the information of the public, shall be privileged, unless it shall be proved that such report or publication was published or made maliciously: Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter: Provided also, that the protection intended to be afforded by this section shall not be available as a defence in any proceedings if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared a reasonable letter or statement by way of contradiction or explanation of such report or other publication and has refused or neglected to insert the same: Provided further, that nothing in this section contained shall be deemed or construed to limit or abridge any privilege now by law existing, or to protect the publication of any matter not of public concern, and the publication of which is not for the public benefit. For the purposes of this section 'public meeting' shall mean any meeting *bona fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted."

This is a considerable extension of the privilege afforded by the former Act. It removes the doubts attendant on the phrase "a public

meeting and open to the public"; it omits the words "lawfully convened," it embraces the publication of police notices and other official announcements. But it still, in my opinion, leaves it the duty of the editor to edit all reports of public meetings, and excise every matter that is "not of public concern and the publication of which is not for the public benefit." And he must remember that while there are many matters which concern the public in which they take no interest, they take great interest in many other matters with which they have no concern.

The first case reported under this section was *Kelly* v. *O'Malley and others*, 1889 (6 Times L.R. p. 62). There the plaintiff endeavoured to address a meeting of dock labourers, called to discuss the Sugar Bounties; but he was prevented by a torrent of abusive interruptions from some men who had known him years before at Bristol, and who attended the meeting for the purpose of annoying him and preventing him from speaking. These interruptions were accurately reproduced in the *Star* newspaper, although they had nothing whatever to do with the Sugar Bounties, but related to matters that had

occurred at Bristol ten or twelve years ago. Mr. Baron Huddleston left to the jury the question whether such matters were of public concern, and their publication for the public benefit, with a strong intimation of his own opinion that they were neither, in which the jury concurred. It has also been decided by Wills, J., at Nisi Prius, that the ordinary religious service held in a Baptist chapel on a Sunday evening is not "a public meeting" within this section, although the chapel doors were necessarily open to the public, and indeed the subject of the sermon—which was political rather than religious—had been specially announced by advertisements in the local press (*Chaloner* v. *Lansdown and Sons*, 1894, 10 Times L.R. 290).

But note that this is the only section which affords any protection to a newspaper that reports the proceedings of a public meeting. If the defendant claims privilege for any such report, he must show that it comes within this section.

Malice

In all the cases which I have dealt with to-night, the privilege, if any, is qualified;

and it is open to the plaintiff to endeavour to rebut it by showing that the defendant was actuated by malice. The necessity for proving malice arises as soon as the judge rules that the occasion is privileged, but not before. "Malice does not mean malice in law, a term in pleading, but actual malice . . . a wrong feeling in a man's mind. The defendant is not entitled to protection, if he uses the occasion for some indirect and wrong motive" (*Clark* v. *Molyneux*, 1877, 3 Q.B.D. at pp. 246, 247). Malice may be proved by *extrinsic* evidence, showing that there were former disputes or ill-feeling between the parties, or other libels or slanders published by the defendant of the plaintiff. Or it may be proved by *intrinsic* evidence, such as the unwarranted violence of the defendant's language or the unnecessary extent given to the publication. Mere stupidity or forgetfulness is not malice, nor is negligence, nor careless blundering, nor want of sound judgment, nor honest indignation. But it is proof positive of malice if the jury are satisfied that the defendant did not honestly believe in the truth of the charge he made at the time he made it. It can never be a man's duty to circulate lies. So if the

statement was made wantonly, if the defendant did not care whether his words were true or not, such indifference will be evidence of malice to go to the jury.

Take the commonest case of a privileged communication, where a master is asked to give his former servant a 'character.' If any character is given, it must be such as the master honestly believes to be true. I do not mean that at the trial the master is bound to prove that his words were literally true. He need not justify; and if he does not, that is no evidence of malice. But if the servant can show that her master, whether from any ill-feeling against her, or from a desire to retain her in his own service, gave her a bad character when he knew that she deserved a good one, that would prove that he was acting maliciously, and all privilege would be lost. So if the plaintiff can satisfy the jury that the defendant made reckless statements about her character or her work, not knowing or caring whether they were true or false, such recklessness is evidence of malice. And, indeed, where master and servant have been living under one roof for some years, it is hardly possible for the master not to know of his own know-

ledge whether the servant is or is not clean, civil, and truthful. If under such circumstances the master gave her a bad character, declaring that she was slovenly, disrespectful, and untruthful, proof that she was clean, civil, and truthful would not merely be proof that the words were untrue; it would also be evidence that the defendant knew they were untrue, which is strong evidence of malice. Such evidence, therefore, is admissible under such circumstances as part of the plaintiff's case, although no justification is pleaded.

So, too, in answering a confidential enquiry made by one who has a right to be told the facts, it may be the defendant's duty to make statements about the plaintiff which do not redound to his credit. Such statements should be made under a serious sense of responsibility and with an honest desire to deal fairly with the plaintiff as well as with the person who asks for the information. The defendant must be especially careful, if he is merely repeating something that he has heard, not to heighten its colour or exaggerate its import; he should tell his correspondent that he does not know it of his own knowledge, but only by hearsay; he should not state a rumour as a fact. Above

all, he must honestly believe in the truth of the charge he makes at the time he makes it. And this implies that he must have some ground for the assertion; it need not be a conclusive or convincing ground, but no charge should ever be made recklessly and wantonly, even in confidence. And this is still more imperatively necessary where the information is volunteered; there it is not enough that the defendant sincerely believed in the truth of what he wrote, the jury must also be satisfied that he wrote it under a strong sense of duty which compelled him to take the unusual course of communicating with the person concerned, before any inquiries were made.

Letters which impute crime or misconduct to others must always be written with the honest desire to promote the ends of justice, and not with the purpose of obtaining any indirect advantage for the writer. Serious accusations should not be made recklessly or wantonly; they must always be warranted by some circumstances reasonably arousing suspicion. And they must not be made unnecessarily to persons whom they do not concern, nor before more persons, nor in

stronger language, than necessary. And even where they are addressed to the proper person who has jurisdiction to deal with the matter, still the jury may hold that the defendant acted maliciously, if he eagerly seized on some slight and frivolous matter and without any inquiry into the merits,—without even satisfying himself that the account of the matter that had reached him was correct,—hastily concluded that he had discovered a great public scandal which called for the immediate intervention of the officers of the State.

So with statements which a defendant deems it necessary to make in order to protect his private interests or interests which he holds in common with others. In the first place, the defendant must honestly believe that he possesses the right which he claims. And this involves that he must have some ground for making such a claim. "The jury may infer malice from the absence of probable cause, but they are not bound to do so. The want of probable cause does not necessarily lead to an inference of malice" (*per* Maule, J., in *Pater* v. *Baker*, 3 C.B. at p. 868). Next, in claiming a right for himself or in resisting a

claim made by another, the defendant must be careful to use temperate language, and to restrict himself to matters relevant to the claim. It is seldom necessary in self-defence to impute evil motives to others, or to charge your adversary with dishonesty or fraud. If, therefore, in writing or speaking on a privileged occasion the defendant breaks out into irrelevant charges against the plaintiff, such excess may be some evidence of malice.

Still, if the defendant honestly believed the plaintiff's conduct to be such as he described it, the mere fact that he used strong words in so describing it is no evidence of malice to go to the jury. The test appears to be this: The jury should take the facts as they appeared to the defendant's mind at the time of publication, and then ask themselves whether the terms used are such as the defendant might have honestly employed under the circumstances? If so, the strength of his language points to *bona fides* rather than to malice. It is not enough that the expressions are angry, the jury must go further and see that they are malicious. "The particular expressions ought not to be too strictly scrutinised, provided the intention of the defendant was

good" (*per* Alderson, B., in *Woodward* v. *Lander*, 6 C. & P. 550). "A man may use excessive language, and yet have no malice in his mind" (*per* Lord Esher, M.R., 1895, 2 Q.B. at p. 170).

Take as an example the case of *Spill* v. *Maule* (L.R. 4 Ex. 232). There the defendant was a creditor of the plaintiff's and appointed to wind up the affairs of the plaintiff's firm. He learned that the plaintiff had recently taken from the cash-box a parcel of bills to the amount of £1264. Thereupon the defendant wrote to another creditor of the firm that the conduct of the plaintiff "has been most disgraceful and dishonest; and the result has been to diminish materially the available assets of the estate." It was held in the Exchequer Chamber that the occasion was privileged, and that there was no evidence of malice. The words were strong, no doubt: yet, when taken in connection with the facts, they were such as might have been used honestly and *bona fide* by the defendant; the plaintiff's conduct in removing the bills during the winding-up was equivocal and might well be supposed by the defendant to be such as he described it. There was no other evidence of

malice; so the judge acted rightly in directing a verdict for the defendant. The burden of proving malice lies on the plaintiff; and whenever the only evidence relied on for this purpose is as consistent with *bona fides* as with malice, the judge should stop the case.

Damages

If, however, the jury find as a fact that the defendant has maliciously written and published words defamatory of the plaintiff on an occasion of qualified privilege, then the only question left for them to decide is, At what amount shall we fix the damages? The assessment of damages is peculiarly the province of the jury in an action of libel: and the Court of Appeal will not grant a new trial on the ground that the damages are either excessive or insufficient, unless it is satisfied that no reasonable men could honestly have assessed them at that figure. Of course, if the plaintiff has suffered any *special* damage (*i.e.* any special pecuniary loss caused directly by the libel) he should prove this at the trial (if it has been pleaded; for strictly it cannot be proved unless it has been pleaded). But suppose there is no special damage; still the plaintiff is entitled to

recover *general* damages for the injury done to his reputation. And the amount awarded for such general damages may be substantial, although the plaintiff cannot prove that he has suffered any pecuniary loss in consequence of the libel. For in an action of libel "the damages are not limited to the amount of pecuniary loss which the plaintiff is able to prove" (*per curiam* in *Davis* v. *Shepstone*, 11 App. Cas. at p. 191). "The jury in assessing damages are entitled to look at the whole conduct of the defendant from the time the libel was published down to the time they give their verdict. They may consider what his conduct has been before action, after action, and in Court during the trial" (*per* Lord Esher, M.R., in *Praed* v. *Graham*, 24 Q.B.D. at p. 55). In practice, the amount of damages awarded depends in large measure upon the line of defence adopted by the defendant at the trial. If, for instance, he persists right up to the end of the trial in an attempt to justify the libel and fails in that attempt, the jury will probably mark their sense of such conduct by awarding heavy damages against him. In some cases, too, the learned judge will, if asked, grant an injunction

to restrain the defendant from doing further injury to the plaintiff by continuing to circulate the libel.

Costs

Lastly comes the all-important question of costs. An action of libel cannot be brought in the County Court, except by consent. Hence if the jury find a verdict for the plaintiff for any amount of damages, however small, he will recover the whole of his costs of the action, "unless the judge by whom such action is tried, or the Court, shall for good cause otherwise order" (Order LXV., r. 1). What is "good cause"? There was formerly much discussion on this point. That eminent judge, the late Lord Justice Bowen, held that the mere fact that the jury had awarded the plaintiff in an action of libel *contemptuous* damages (*e.g.* only a farthing or a shilling), was of itself evidence that the action ought not to have been brought, and therefore (*prima facie* at all events) "good cause" for depriving the plaintiff of costs. But the majority of the Court of Appeal (Lord Esher, M.R., and A. L. Smith, L.J.) thought otherwise. They decided that the smallness of the

amount of damages recovered could not of itself prevent the costs from following the event; because the verdict, however small, is the event which the costs are to follow. If, however, a plaintiff does not bring the action *bona fide* to clear his character from an imputation, but allows his name to be used for the purpose of raising a political controversy and injuring political opponents, or has otherwise been guilty of oppression or misconduct—in such cases good cause exists for which a judge might well in the exercise of his discretion deprive the plaintiff of costs. See *O'Connor* v. *The Star Newspaper Company, Limited*, 1893, 9 Times L.R. 233; 68 L.T. 146.

Here then we must leave the civil action for damages for defamation. In my concluding lecture we must take a hasty glance at the criminal law of libel.

VI

CRIMINAL LAW

I PROPOSE to deal to-night with a different aspect of the law of libel from that which has hitherto engaged our attention. To write and publish a libel is a crime. Merely to speak defamatory words of a private individual may be an actionable wrong, but is no crime. Why is this?

The distinction between a tort and a crime is, it is true, of a somewhat accidental character. It is not based on any clear logical principle, but rather finds its explanation in history. At different periods, different acts have been regarded either as tortious or as criminal, according to the prevailing sentiment of the day. Many acts are now criminal in England which were formerly matters of purely civil jurisdiction. In Roman Law theft was a tort; but we consider it a crime. The Romans

regarded adultery as a crime; in English law it is a civil injury, giving a right to damages. Writers on jurisprudence tell us that a crime is an injury which directly affects the State, while a tort directly affects the individual. But I am not sure that they are right in saying that. I fancy that if you were being murdered, you would think that murder at all events was a crime which directly affected the individual. Other writers say that the substantial distinction lies rather in the remedy pursued: when the wrongful act is a crime, the State prosecutes and punishes the offender; when it is a tort, the remedy is left in the hands of the individual aggrieved, who may sue for damages or not, as he pleases. Well, I am not clear about this distinction, either. Criminal proceedings for libel at all events are always "private prosecutions"; and indeed it is seldom that the State initiates any criminal proceedings of its own accord: it generally waits for some individual to set it in motion. Perhaps the most accurate way of stating the distinction is this:—The object of criminal proceedings is to punish the offender and to prevent any repetition of the offence; the object of civil proceedings is to

compensate the person injured by giving him damages. The State pursues the former object, independently of any action taken by the individual, and with that object it declares criminal every wrongful act the repression of which is necessary for the protection of public safety.

Now the State is obviously interested in repressing all such libels and lampoons as are calculated to provoke a breach of the peace, or which for any other reason tend to disturb the civil order and harmony of society. Hence it is a misdemeanour punishable with fine and imprisonment to write and publish defamatory words of any living person, or to exhibit any picture or effigy defamatory of him, provided the publication of such words, or the exhibition of such picture or effigy, is calculated to cause a breach of the peace. The attempt to publish such words or to exhibit such picture or effigy is also a crime. A libel on a thing is no crime: and wherever no action would lie without proof of special damage, no indictment or information can be preferred. For it is improbable that Mr. Mellin would be provoked to blows if a rival manufacturer disparaged his "Food for infants." It is no

crime to utter defamatory words, however maliciously.

But you will say, "Does not a slander tend to produce a breach of the peace? If a man calls me a liar to my face, I am more likely to knock him down than if he wrote that offensive expression from a safe distance in a letter."

That is true, no doubt. I told you just now that it was impossible to draw the line between tort and crime with any strict logical precision. The State has thought fit to say that a libel shall be both a tort and a crime, while it has left a slander a tort only. And I think this is right, even if one admits that some slanders are just as likely to cause a breach of the peace as some libels. For the mischief done by libels is so extensive, and the bad example they set is so pernicious, that it is right that they should be repressed for the public good. Once a thing is printed, you never know into whose hands it may come. It may turn up years hence and be used against you behind your back. "Here it is in print." And so many foolish people will believe anything they see in print. Slanders, on the other hand, do less mischief.

They are probably uttered in a moment of anger and haste, they are less permanent and more easily forgotten, and their evil influence in spite of gossipers is not so widely diffused as a libel in a newspaper. Anyhow, it is the law of England that a slander on a private individual is a tort and not a crime, while a libel on a private individual is both a tort and a crime.

The person libelled is not bound to pursue both his remedies—or indeed either remedy. If he is content to sue for damages, no one will blame him. But it is necessary for the repression of libels that there should be a criminal remedy as well. Libellers are often penniless, and a civil action therefore has no terrors for them. The plaintiff will never get his damages. I believe it is a fact, though I am sorry to think it so, that the proprietor of many a low newspaper rather rejoices at the prospect of a civil action for libel being brought against him. He regards it as a gratuitous advertisement for his paper which will probably increase its circulation in these degenerate days. Hence the civil remedy is not by itself a sufficient protection for the public.

But though it is right that there should be a criminal remedy for libel, I do not know any reason why there should be two criminal remedies. As the law stands now, the person libelled can in some cases proceed either by way of indictment or by criminal information. The number of criminal informations has, however, been very greatly reduced since the decision in the case of the prosecution of Mr. Labouchere by the Duke of Vallombrosa, 1884, 12 Q.B.D. 320. This special relief is very rarely granted, except to some high officer of State. So I need trouble you no further with the niceties of criminal procedure and pleading.

The State intervenes in the interests of public peace and order to protect our reputations from wanton and malicious attacks. It follows, therefore, that not every libel is a crime, but only those which the State has an interest in repressing. In other words, not every publication which would be held a libel in a civil case, can be made the foundation of criminal proceedings. It has been clearly laid down by Lord Coleridge, the late Lord Chief Justice of England, both in the case of *R.* v. *Labouchere*, which I have just cited,

and also in the case of *Wood* v. *Cox*, 4 Times L.R. at p. 654, that

"A criminal prosecution ought not to be instituted unless the offence be such as can be reasonably construed as calculated to disturb the peace of the community. In such a case the public prosecutor has to protect the community in the person of an individual. But private character should be vindicated in an action for libel, and an indictment for libel is only justified when it affects the public, as an attempt to disturb the public peace."

While therefore criminal proceedings will not lie in every case in which a civil action can be brought, so on the other hand the criminal remedy for libel is in some cases more extensive than the civil. You will see at once that there may be many libels the circulation of which would be a danger to the State, and which yet might afford no ground for an action for damages. Thus, it is a misdemeanour to libel any sect, company, or class of men, without mentioning any person in particular; provided it be alleged and proved that such libel tends to excite the hatred of the people against all belonging to such sect or class, and conduces to a breach of the peace. Thus where the defendant published in his newspaper a libel on all the nuns in a

particular nunnery, criminal proceedings were taken and the defendant was convicted (*R.* v. *Gathercole*, 1838, 2 Lewin, C.C. 237). But here no civil action would have lain, because the aspersion was cast upon the characters of all the nuns in general, and no one was singled out by name who could be a plaintiff. In an earlier case, *R.* v. *Osborn*, 1732, 2 Barnard. 138, 166, the defendant published a sensational account of a cruel murder said to have been committed by certain Jews lately arrived from Portugal and then living near Broad Street. They were said to have burnt a woman and a new-born baby alive, because its father was a Christian. Certain Jews who had recently arrived from Portugal, and who then lived in Broad Street, were in consequence attacked by the mob, barbarously handled, and their lives endangered. Criminal proceedings were at once commenced against the defendant. The objection was raised that it did not appear precisely who were the persons accused of the murder, and that no civil action for damages could therefore have been brought for want of a proper plaintiff. But the Court held that it was wholly immaterial whether a civil action

would lie or not, and granted a criminal information; for obviously there would soon have been a riot, if not a massacre, in Broad Street, if such libels had not been promptly suppressed.

Again, criminal proceedings may be taken if the defendant has been mean enough to publish defamatory words about a man who is dead, provided the obvious tendency of such words is to provoke his family to a breach of the peace (*R.* v. *Topham*, 1791, 4 T.R. 126). Such a libel, from the point of view of the State, is just as pernicious as a libel on a living man, who might take the law into his own hands and chastise the offender himself. But of course no civil action can be brought for a libel on a dead man. This was decided not long ago in India. The defendant was present at the funeral of a Hindoo chieftain, Premji Ludha, the headman of the Karad caste, and there, before a large concourse of people, made a violent attack on the moral and religious character of the deceased, declaring that he was "palit," a term of great opprobrium and reproach among Hindoos. Many of those present left at once in consequence of what the defendant said, and the

family of the deceased suffered great pain and annoyance, and were much lowered in the estimation of the public. The plaintiff sued as the heir and nearest relation of the deceased for damages, but he was not allowed to recover any. That is the decision in the case of *Luckumsey Rowji* v. *Hurbun Nursey and others*, I.L.R. 5 Bombay, 580. But in England, had such words been written, an indictment would have lain, as they clearly tended to provoke a breach of the peace. It is not necessary to prove that a breach of the peace was actually committed; still less that the libeller intended or desired that an assault should ensue: that is probably the last thing that he wished for. It is enough if the natural effect of the words is to vilify the memory of the deceased and to injure his posterity to such an extent as to render a breach of the peace imminent or probable. But in Cardiff in 1886 an assault did actually follow on the publication of such a libel. In 1883 a Mr. Batchelor died, who had occupied several important public posts in Cardiff, and some of his friends proposed to erect a statue of him, which now stands in one of the public spaces in the town of Cardiff. Thereupon the *Western*

Mail, a widely-circulated local paper, which had as a rule espoused the opposite cause to that advocated by the deceased in various municipal and political matters, thought fit to publish a sarcastic epitaph for the proposed statue. This was the paragraph:

"Our esteemed correspondent 'Censor' sends us the following suggested epitaph for the Batchelor statue:—

"'In honour of John Batchelor, a native of Newport, who in early life left his country for his country's good; who on his return devoted his life and energies to setting class against class; a traitor to the Crown, a reviler of the aristocracy, a hater of the clergy, a panderer to the multitude; who, as first Chairman of the Cardiff School Board, squandered funds to which he did not contribute; who is sincerely mourned by unpaid creditors to the amount of £50,000; who, at the close of a wasted and misspent life, died a pauper —this monument, to the eternal disgrace of Cardiff, is erected by sympathetic Radicals. Owe no man anything.'"

This did lead to a breach of the peace. Mr. Batchelor's son called on the editor, and assaulted him. Not content with that, he indicted him for libel. Mr. Justice Wills, in charging the grand jury, directed them, in accordance with *R.* v. *Topham* (*supra*) and *R.* v. *Walter* (*post*, p. 190), that the indictment

lay. But Mr. Justice Stephen directed the petty jury to acquit the defendant (*R.* v. *Ensor*, 1887, 3 Times L.R. 366).

The object of civil proceedings, then, is to compensate the person libelled for the injury done to his reputation by the defendant's words. But criminal proceedings are brought in the interests of the community, in order to prevent the publication of libels which tend to provoke a breach of the peace or are otherwise harmful to society. This distinction will explain all the differences which exist between the civil and the criminal law of libel. Take, for instance, the matter of publication. I trust I have made it clear to you that in civil actions for damages the plaintiff must prove a publication to some third person; as without that there is no injury done to his reputation, and nothing therefore for which he can claim compensation. But it does not matter to the State whether a plaintiff is entitled to damages or not. If the defendant's act is calculated to lead to a breach of the peace, it must be stopped. Now, a libel published only to the person whom it defames endangers the peace and good order of society, just as much as one addressed to a third person—indeed it is

probably more dangerous. Hence, in criminal proceedings, it is sufficient for the prosecutor to prove a publication to himself alone (see *R.* v. *Adams*, 1888, 22 Q.B.D. 66). It is not necessary for him to show that his reputation has been injured; for he is not claiming any compensation for himself, but only seeking to promote the interests of the public.

For the same reason it is no answer to criminal proceedings for the defendant to prove that his words are literally true; he must go further, and show that it was for the public benefit that such words should be published; otherwise there is no countervailing advantage to compensate the public for the risk of a breach of the peace. Indeed, at common law the defendant was not allowed in any case to prove in a criminal trial that his words were true. It was a complete answer to a claim for damages; but it was no defence to a prosecution, for it was thought that the very fact that his words were true would render it more probable that a breach of the peace would follow the publication. This is what is meant by the old maxim, "The greater the truth, the greater the libel." That maxim never applied to civil proceedings for damages; if the charge

made by the defendant was true, the plaintiff never could recover any damages; for his reputation had only been reduced to its proper level, and the reduction, though an unkind, was not a wrongful, act. But in criminal proceedings, until the year 1843, the fact that the words were true was regarded as wholly irrelevant. No evidence of that kind was admissible; the attempt to give such evidence was regarded as an aggravation of the original offence. Still there are many occasions on which it is desirable that the whole truth should be made known, and to this extent the law has been altered by sec. 6 of Lord Campbell's Act, 1843. To any indictment for a libel on a private individual, the defendant is now allowed to plead that his words are true, provided he adds that it was for the public benefit that his words should have been published. But it still remains the law in all cases of blasphemous or seditious libel that no evidence whatever of the truth of the words will be received.

Other instances were discovered in which the criminal law pressed on individuals who were really innocent with a severity greater than the interests of the public required. Thus

it was the rule in both civil and criminal proceedings—and a good and wholesome rule—that a master is liable for all acts of his servant done in the ordinary course of that servant's employment and in pursuance of the master's orders, expressed or implied. This rule pressed very hardly on the proprietor of a newspaper. He was not only liable in damages, but he was also criminally liable, if his editor permitted a libel to appear in the paper, although he himself had never seen it. Thus, the first of the great house of Walter resided in the country and left the management of the *Times* entirely to his son, with whose discretion or indiscretion he never interfered. The son allowed a libel on the late Earl Cowper to appear in the columns of the *Times*, and the father was prosecuted and convicted, Lord Kenyon, C.J., holding that he was clearly "answerable, criminally as well as civilly, for the acts of his servants" (*R.* v. *Walter*, 1799, 3 Esp. 21).

Hence Lord Campbell inserted in his Act a clause (now the 7th section) which enables the proprietor of a newspaper in which a libel has inadvertently appeared to prove that such publication was made without his authority,

consent, or knowledge, and did not arise from want of due care or caution on his part. Such proof is now an answer to an indictment, though it is still no defence to a claim for damages. But this section of Lord Campbell's Act afforded no protection to the reporter or to the editor of the paper, or to the printer who actually set up the type. Accordingly in 1881 a provision was inserted in the Newspaper Libel and Registration Act for the further protection of the press. It declared that

"No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper, for any libel published therein, without the written *fiat* or allowance of the Director of Public Prosecutions in England or Her Majesty's Attorney-General in Ireland being first had and obtained."

But this clause was found not to work to the satisfaction of the newspaper world. I do not know anything about Her Majesty's Attorney-General in Ireland, but the Director of Public Prosecutions in England got into the way of granting his *fiat* whenever he was satisfied that the publication to which his attention was directed was a libel; and it was not his practice to hear the proposed defendant on

the matter; he used to give leave in general terms for criminal proceedings against the editor or the printer or the publisher of a certain newspaper, without naming him. This had to be altered. I do not know how it is, but none of our modern law reforms answer on the first attempt. There always have to be two bites at the cherry! I think perhaps it is because the members of the House of Commons sit up too late at night. Anyhow, when the Law of Libel Amendment Bill was before the House of Lords in 1888, the late Lord Chief Justice of England introduced the following clause, which is now section 8 of the Act:—

"No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein without the order of a Judge at Chambers being first had and obtained. Such application shall be made on notice to the person accused, who shall have an opportunity of being heard against such application."

This provision works well. It is found in practice much more difficult to obtain an order under it from a Judge at Chambers than it was in former days to obtain the *fiat* of the Public Prosecutor—a result which the late Lord Coleridge probably contemplated and desired.

And, apart from any apprehension of a breach of the peace, there are other occasions on which the State interferes to suppress publications which are obviously harmful. Take, for instance, blasphemous words. It is a misdemeanour to speak, or to write and publish, any profane words vilifying or ridiculing God, Jesus Christ, the Holy Ghost, the Old or New Testament, or Christianity in general, with intent to shock and insult believers, or to pervert or mislead the ignorant and unwary. This intent is an essential element in the crime. For, as Lord Coleridge, L.C.J., pointed out in his most valuable judgment in *R.* v. *Ramsey and Foote*, 1883, 48 L.T. 739; 15 Cox, C.C. 231, heresy in this country is no crime. A man may hold any opinions on religious matters which commend themselves to his intellect or his conscience. And he may fearlessly avow any opinions which he conscientiously entertains. But he may not wound or insult the religious feelings of others by irreverently scoffing at sacred things.

So with obscene publications. It is a misdemeanour to publish obscene or immoral books or pictures. Moreover, by the 20 & 21

Vict. c. 83, justices in certain cases may issue a warrant authorising their officer to search for, seize, and bring before them, obscene books and pictures; and then to serve a summons on their owner, on the hearing of which the justices may order such books or pictures to be destroyed.

Public safety also demands the repression of all seditious words. It is therefore a misdemeanour to speak or to write and publish any words which tend to bring into hatred or contempt the sovereign, or his ministers, or the government and constitution of the realm, or either House of Parliament, or the Courts of Justice, or to excite his Majesty's subjects to attempt the alteration of any matter in Church or State otherwise than by lawful means. But where there is no intent to create disaffection or to disturb the peace and tranquillity of the realm, the utmost latitude is allowed in the discussion of all public affairs. A fair comment on any matter of public interest is of course no crime. "The power of free discussion," says Lord Kenyon, C.J., in *R.* v. *Reeves*, 1796, Peake, Add. C. 86, "is the right of every subject of this country. . . . In a free country like ours, the productions of

a political author should not be too hardly dealt with." "The people have a right to discuss any grievances they may have to complain of" (*per* Littledale, J., in *R.* v. *Collins*, 1839, 9 C. & P. 461). "A journalist may canvass and censure the acts of the Government and their policy—and indeed it is his duty" (*per* Fitzgerald, J., in *R.* v. *A. M. Sullivan and others*, 1868, 11 Cox C.C. 54).

There are old cases which appear to go farther, and to decide that any publication tending to beget an ill opinion of the Government is a criminal libel. Lord Holt, C.J., said in 1704, "If persons should not be called to account for possessing the people with an ill opinion of the Government, no Government can subsist; for it is very necessary for all Governments that the people should have a good opinion of it." And Lord Ellenborough, C.J., expressly following this *dictum*, told the jury in *R.* v. *Cobbett* (1804, 29 Howell's St. Tr. 49), "It is no new doctrine that if a publication be calculated to alienate the affections of the people, by bringing the Government into disesteem, whether the expedient be by ridicule or obloquy, . . . it is a crime." If this is to be taken literally, all Opposition newspapers

commit that crime every day. Such a doctrine, if strictly enforced, would destroy all liberty of the press. It is, moreover, in direct conflict with more recent *dicta* (such as those cited in the last paragraph) and with the whole spirit of our Constitution and the tendency of modern times. Sir Francis Burdett could not possibly be convicted in the present day for an electoral address such as that which he issued on 22nd August 1819. It is clearly legitimate and constitutional to endeavour, by means of arguments addressed to the people, to replace one set of ministers by another. And the precise object of such arguments is to bring the ministers now in office into disesteem, and to alienate from them the affections of the people. I think, however, that Lord Holt's words must not be taken strictly in their modern signification: we must construe them with reference to the times in which he lived. He clearly was not referring to a quiet change of ministry which in no way shakes the throne, or loosens the reins of order and government. In 1704 the present system of party-government was not in vogue; it was barely conceived by William III., and was certainly not generally understood under Queen Anne. And even in

Lord Ellenborough's time the ministry were still appointed by the king and not by the people. By "the Government" both judges meant, not so much a particular set of ministers, as the political system settled by the Constitution, the general order and discipline of the realm. "To subvert the Government" is the phrase employed in the earlier case of *R.* v. *Beere*, 12 Mod. 221; Holt, 422; and to Lord Holt's mind "subverting the Government" meant bringing in the Pretender, to Lord Ellenborough's it meant the introduction of Jacobinism and Red Republicanism from France: not the mere substitution of one Prime Minister for another.

One special branch of the law relating to seditious words requires a passing notice. The judges have power to punish summarily any "contempt of Court," with fine or imprisonment. Under this term are included all insulting attacks on the judges or the officers of the Court, and also all adverse comments published while the proceedings are pending, abusing either of the parties or his witnesses before the cause can be heard on its merits. Latterly the tendency of our Courts has been to discourage all application for committal,

where only a technical contempt of Court has been committed, which did no real harm to the complainant. But any deliberate attempt to prejudice the mind of the public against the plaintiff or his witnesses, or to prevent or obstruct the fair trial of the action, will certainly be punished. I was counsel recently in such a case: *The Birmingham Vinegar Brewery Company* v. *Henry*, 1894, 10 Times L.R. 586. There the plaintiffs, who were vinegar manufacturers, complained of a libellous article which had appeared in the defendant's journal in December 1893, which denounced the vinegar supplied by the plaintiffs as impure, and alleged that a shopkeeper at Bridlington had been prosecuted under the Adulteration Act and convicted for selling it as pure malt vinegar. As a matter of fact, however, the shopkeeper at Bridlington had been acquitted; three analysts from Somerset House having certified that the vinegar in question was pure malt vinegar. While the action was still pending, the defendant published in his paper a second article, fiercely attacking the Somerset House analysts in reference to another case. It then referred to the Bridlington case, and continued:

"Their ignorance, however, not only enabled the vendors to escape punishment, but gave the manufacturers of the alleged pure malt vinegar an opportunity of issuing lying circulars to grocers everywhere throughout the Kingdom, alleging their vinegar to be pure malt vinegar, which it most certainly is not."

It was clear from the context that the plaintiffs were the persons referred to as "the manufacturers of the alleged pure malt vinegar." It will be observed that this article repeated the libel sued on; it reasserted that the plaintiffs' vinegar was not pure malt vinegar. This alone may not amount to contempt of Court (*Cronmire* v. *The Daily Bourse, Limited*, 9 Times L.R. 101). But the article complained of went further; it attacked the witnesses whom the plaintiffs would certainly call at the trial, denouncing their ignorance and stupidity in unmeasured terms. The Divisional Court (Wills and Vaughan Williams, JJ.) regarded the article as clearly a contempt of Court; had a committal been pressed for, they would have sent the defendant to prison. As my clients did not insist on this, the Court ordered the defendant to pay the costs of the motion as between solicitor and client, to enter into an undertaking that, until the trial of the action, there should be no more attempts

to prejudice the course of justice by articles in his paper, and to stop all further sale of the particular issue of which the plaintiffs complained.

Such contempts of Court are rightly punished; and so are all seditious words which directly tend to create riot and disorder. But, subject to these restrictions which are necessary for the protection of public safety, our newspapers are free to publish what they choose. This country is the birthplace of "the Liberty of the Press." At first, no doubt, the printing-press was regarded with apprehension, and deemed a danger to the State. The king endeavoured to restrict the number of presses and to keep them all in safe hands. Then a Censor was appointed, and no one might print (or, later, publish) a book without his *Imprimatur*. This censorship continued till 1695, in spite of Milton's noble protest, the *Areopagitica*, published on 24th November 1644. But since 1695 no preliminary license is necessary: any man may publish what he will; but he must be prepared to take the consequences, if a jury shall find that what he has published is a libel.

"The liberty of the press," says Lord

Mansfield, in *R.* v. *Dean of St. Asaph*, 1784, 3 T.R. 431, *n.*, "consists in printing without any previous license, subject to the consequences of law." "A man may publish anything which twelve of his countrymen think is not blamable" (*per* Lord Kenyon in *R.* v. *Cuthell*, 1799, 27 Howell's St. Tr. 675).

Prior to 1792, indeed, this question was deemed one for the judge rather than the jury in a criminal case. The jury found the fact of publication, and then the judge decided whether the words were libellous or not. But Mr. Fox's Act (32 Geo. III. c. 60) put a stop to this, and restored the earlier criminal law, by which the practice in civil and criminal cases was identical, viz.—that the question of libel or no libel was for the jury. The judge should explain to them what a libel is; he may state for their guidance what his own opinion is of the document before him: but the ultimate decision of the question rests with the jury. Since Fox's Act, the English press has been the freest in the world.

In conclusion I beg to thank you for the attention with which you have listened to my lectures. In the course of them we have referred to actions of libel brought by every

conceivable kind of plaintiff—with one exception. There is one of our institutions which it seems may be abused with absolute impunity, and that is the law of the land. It has no friends, and it cannot even bring an action for libel. This abuse of our law is the result of ignorance of our law. It was not always so in England. Our ancestors were familiar with the law under which they lived; they were fond of it; they were proud of it. And with good reason; for to them the whole world came for lessons in the law of freedom. My endeavour throughout these lectures has been so far as possible to get down to those broad common-sense principles which underlie our whole law. Conscious as I am of the lack of form and of the defects of expression which mar our law, yet this I will say—the law of England, when once you find out what it is, is a better law and a more enlightened law than any other system which the world has ever seen. I have endeavoured to make clear to you what in its essence our law of libel is; and I hope and trust that if any one hereafter should in your presence abuse this branch of our law, you will do your best to remove from his mind that ignorance which causes—

though it does not excuse—such misconception, and to convince him that on this point as on all others the law of England, when accurately ascertained, is always sensible and just.

SUMMARY OF THE FOREGOING LECTURES

I

LIBEL

To be libellous, words must be

(i.) Written or printed or otherwise permanent. A picture, an effigy, or a statue may be a libel (*Monson* v. *Tussauds, Limited*, 1894, 1 Q.B. 671). Words will be actionable if written or printed and published, which would not be actionable if merely spoken. This distinction between libel and slander is now too well established to be ever shaken (*Thorley* v. *Lord Kerry*, 1812, 4 Taunt. 355).

(ii.) They must also be defamatory : *i.e.* they must have injured the reputation of some *person*, "have made people think worse of him." And that person must be the plaintiff (*Australian Newspaper Company, Limited* v. *Bennett*, 1894, A.C. 284). Words are not defamatory in this sense, if they merely depreciate some *thing*, or impugn the plaintiff's *title* to some property.

A Trade-libel is a statement, whether written or verbal, which does not attack a man's moral character,

or question his solvency, or in any way affect his private or professional reputation, but which has in fact injured his business and caused him pecuniary loss in the way of his trade (*Ratcliffe* v. *Evans*, 1892, 2 Q.B. 524).

"Slander of Title" is the term usually employed to include all statements, whether written or spoken, which impeach a man's title to any property, real or personal. Such words clearly do not affect his reputation (*Hatchard* v. *Mege and others*, 1887, 18 Q.B.D. 771).

In cases of Trade-libel and Slander of Title, the plaintiff must prove (*a*) malice, (*b*) that the words are false, (*c*) that they have caused him special damage: otherwise he can obtain neither damages nor an injunction (*White* v. *Mellin*, 1895, A.C. 154). But in an ordinary action of libel, when the words are defamatory of some *individual*, he need prove none of these things; except when the words were published on a privileged occasion, and then he must prove malice.

A corporation or company may sue for any words which affect its property, or injure its trade or business (*South Hetton Coal Company, Limited* v. *North-Eastern News Association, Limited*, 1894, 1 Q.B. 133). But it cannot bring an action in respect of any words which impute to it conduct of which a corporation physically cannot be guilty; such as murder or corruption (*Metropolitan Omnibus Company* v. *Hawkins*, 1859, 4 H. & N. at p. 90). Nor can it sue for any words which are a libel or a slander, not on it, but on its members individually—unless, indeed, special damage has thereby been caused to it (*Mayor, etc., of Manchester* v. *Williams*, 1891, 1 Q.B. 94).

(iii.) Lastly, to be actionable the defamatory words must be published by the defendant to some person

other than the plaintiff. Merely composing a libel is not actionable, unless it be published. And no cause of action arises if the words are only communicated to the person defamed: for that does not injure his reputation.

A publication to the plaintiff's wife is sufficient (*Wenman* v. *Ash*, 1853, 13 C.B. 836; 22 L.J. C.P. 190; *Jones* v. *Williams*, 1885, 1 Times L.R. 572). But a publication by the defendant to his own wife is not (*Wennhak* v. *Morgan*, 1888, 20 Q.B.D. 635).

If a man desires and intends, and does all in his power, to publish defamatory words, and yet they never reach the eyes of any one except the plaintiff himself, no action lies. On the other hand, if a man unintentionally or accidentally publishes defamatory words to a third person, an action will lie, unless he can satisfy the jury that he was guilty of no negligence and was not to blame in the matter. Thus, the sale of every written or printed copy of a libel is *prima facie* an actionable publication. But if the defendant is a newsvendor who neither wrote nor printed the libel but merely sold the newspaper containing it in the ordinary way of his business, and who neither knew nor ought to have known that that newspaper did contain or was likely to contain any libellous matter, he will not be deemed to have published the libel which he thus innocently disseminated (*Emmens* v. *Pottle*, 1885, 16 Q.B.D. 354).

A plaintiff, then, establishes a *prima facie* cause of action if he proves that the defendant has published to some third person written or printed words which have injured the reputation of the plaintiff.

II

FAIR COMMENT ON A MATTER OF PUBLIC INTEREST

Every one has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose. Such comments are not libellous, however severe in their terms, so long as the writer truly states his real opinion of the matter on which he comments. And this right is in no way the special privilege of the press. Every citizen has full freedom to speak and to write on such matters.

This right therefore is not, strictly speaking, a privilege. Legitimate criticism is no tort: should loss ensue to the plaintiff, it would be *damnum sine injuria* (*Merivale and Wife* v. *Carson*, 1887, 20 Q.B.D. 275). "It is only when the writer goes beyond the limits of a fair comment that his criticism passes into the region of libel at all" (1894, 1 Q.B. at p. 143).

True criticism differs from defamation thus:—

(1) Criticism deals only with such things as invite public attention, or call for public comment. It does not follow a public man into his private life, or pry into his domestic concerns.

(2) Criticism never attacks the individual, but only his work. A true critic never indulges in personalities, or recklessly imputes dishonourable motives, but confines himself to the merits of the subject-matter before him.

(3) The critic never takes advantage of the occasion to gratify private malice, or to attain any other object beyond the fair discussion of matters of public interest,

and the judicious guidance of the public taste. He will carefully examine the production before him, and then honestly and fearlessly state his true opinion of it.

So in cases of Fair Comment, in order to relieve the defendant from liability,

(*a*) the words published must be fairly relevant to some matter of public interest;

(*b*) they must be the expression of an opinion, and not the allegation of a fact;

(*c*) they must not exceed the limits of a fair comment;

(*d*) they must not be published maliciously.

(*a*) Whether the matter commented on is or is not one of public interest is a question for the Court (*per* Lopes, L.J., 1894, 1 Q.B. at p. 143). The public conduct of every public man is a matter of public concern. So is the management of every public institution; the conduct of every public body, imperial, local or municipal; the administration of the poor law in any locality; and the sanitary condition of any populous district (*South Hetton Coal Company, Limited* v. *North-Eastern News Association, Limited*, 1894, 1 Q.B. 133). So are

All affairs of state;

Parmiter v. *Coupland*, 1840, 6 M. & W. 105.
Seymour v. *Butterworth*, 1862, 3 F. & F. 372.
Wason v. *Walter*, 1868, L.R. 4 Q.B. 73.

The administration of justice, as soon as the case is over;

Birmingham Vinegar Brewery Company v. *Henry*, 1894, 10 Times L.R. 586.

The management of all public institutions and municipal bodies or local authorities;

Purcell v. *Sowler*, 1877, 2 C.P.D. 215.

Ecclesiastical affairs;

Kelly v. *Tinling*, 1865, L.R. 1 Q.B. 699.

All books published; all pictures publicly exhibited;

Sir John Carr v. *Hood*, 1808, 1 Camp. 355, *n.*
Strauss v. *Francis*, 1866, 4 F. & F. 1107.
Whistler v. *Ruskin*, 26th and 27th Nov. 1878.

All public entertainments, theatrical performances, concerts, etc.; all advertisements and other appeals to the public;

Paris v. *Levy*, 1860, 9 C.B. N.S. 342; 30 L.J. C.P. 11.
Campbell v. *Spottiswoode*, 1863, 3 B. & S. 769; 32 L.J. Q.B. 185.
Morrison v. *Belcher*, 1863, 3 F. & F. 614.
Odger v. *Mortimer*, 1873, 28 L.T. 472.
Davis v. *Duncan*, 1874, L.R. 9 C.P. 396.

(*b*) Comment on well-known or admitted facts is a very different thing from the assertion of unsubstantiated facts for comment. "There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism, and allegations of fact such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct" (*Davis* v. *Shepstone*, 1886, 11 App. Cas. at p. 190). It is not enough that the writer honestly believed the facts to be as he stated

them (*Campbell* v. *Spottiswoode, supra*). But sometimes a phrase which when taken by itself appears to assert a fact will be found on studying its context to be really only comment on other facts, or an inference from them.

(*c*) The limits of a fair comment are laid down, with all possible precision and with due regard to the liberty of the press, in the judgments of the Court of Appeal in *Merivale and Wife* v. *Carson*, 1887, 20 Q.B.D. pp. 279-85, every word of which the student should carefully read.

(*d*) The word "fair," in the phrase "a fair comment," refers to the language employed, and not to the mind of the writer. Hence it is possible that a fair comment should yet be published maliciously. If so, it would seem that an action lies.

III

CONSTRUCTION AND CERTAINTY

Words will not be libellous unless they convey to the reader a definite imputation on some definite person, and that person must be the plaintiff in the action. What meaning the writer intended to convey is immaterial, except possibly in reduction of damages. The words will not be construed according to any secret intent of the writer; but in the sense in which they were understood by those to whom they were published. If no reader can tell what the words mean, there is no libel; for no one's reputation has suffered. If no reader can tell to whom the words refer, there is no libel on the plaintiff.

Whenever it is not obvious from the words themselves who is the person referred to, or what is the imputation cast upon him, the plaintiff should insert in his pleading an averment (which is called an *innuendo*) to make these matters clear. But the innuendo must be such as the words can fairly bear. "As an innuendo cannot make the person certain which was uncertain before, so an innuendo cannot alter the matter or sense of the words themselves" (*James* v. *Rutlech*, 1599, 4 Rep. 17, *b.*). "It is for the Court to determine whether the words used are capable of the meaning alleged in the innuendo; it is for the jury to determine whether that meaning was properly attached to them" (1894, A.C. at p. 287; *Mulligan* v. *Cole*, 1875, L.R. 10 Q.B. 549; *Nevill* v. *Fine Arts, etc., Company, Limited*, 1895, 2 Q.B. 156).

(i.) CERTAINTY AS TO THE PERSON LIBELLED

The person libelled need not be named. It is sufficient if the reader can ascertain who he is. A libel on A may in some cases be also a libel on B. A general imputation on a class may yet refer solely or specially to a member of that class (*Le Fanu* v. *Malcolmson*, 1848, 1 H.L.C. 637). If the words reflect impartially on either A or B, or on some one of a certain number or class, and there is nothing to show which one was meant, no one can sue. Where the words reflect on each and every member of a certain number or class, each or all can sue.

(ii.) CERTAINTY OF THE IMPUTATION

If a defamatory imputation be in fact conveyed to the reader, it does not matter how it was expressed.

It may be hinted or implied, suggested by a question or a mere adjective, hidden under a nickname or some ironical phrase. If the words in their natural and obvious meaning are harmless, still a further question may arise: Were there any facts known both to writer and reader which would lead the latter to understand the words in a secondary and a defamatory sense? This is a question for the jury, provided there be any evidence to go to them of such facts, and provided also it is reasonably conceivable that such facts, if proved, would have induced the reader so to understand the words (*Capital and Counties Bank* v. *Henty and Sons*, 1880, 5 C.P.D. 514; 7 App. Cas. 741; *Russell* v. *Notcutt*, 1896, 12 Times L.R. 195).

TRUTH

It is a complete answer to any action of libel (though alone it is not a defence in criminal proceedings) for the defendant to prove that his words are true. It is presumed in the plaintiff's favour that all defamatory words are false. The plaintiff therefore need give no evidence to show that the words are false: it is for the defendant to prove they are true; and he will not be allowed to try and prove this, unless he has specially pleaded in his Defence that the words are true. This special plea is called a plea of justification. And the justification must be as broad as the charge, and must justify the precise charge. The defendant cannot plead that he published other words than those set out in the Statement of Claim, and that such other words are true (*Rassam* v. *Budge*, 1893, 1 Q.B. 571). So if the libel complained of be, "A said that the plaintiff had been guilty of fraud, etc.," it is not enough for the defendant to prove that A said so; he must go further

and prove that the plaintiff had in fact been guilty of fraud.

It will be sufficient, however, if the defendant can prove that every imputation contained in the libel is substantially true. A slight inaccuracy as to some detail will not prevent his succeeding, if such inaccuracy in no way alters the character of the imputation. But if the words which the defendant cannot prove to be true are a material aggravation of the main imputation, or insinuate some further charge in addition to it, the plaintiff will be entitled to a verdict. The test always is, Did the libel as published have a different effect on the mind of the reader from that which the actual truth would have produced?

Although a plea of justification will not be a bar to the action, unless it justifies the whole libel, still, the defendant is sometimes allowed, in mitigation of damages, to justify part only, provided such part contains a distinct imputation which can be separated from the rest. So he may sometimes justify as to one portion, and plead privilege or fair comment to the rest, provided the portion justified be fairly severable from the rest. To be fairly severable, it must be intelligible by itself, and must convey a distinct and separate imputation against the plaintiff (*Davis* v. *Billing*, 1891, 8 Times L.R. 58). Where the words are laid with an innuendo in the Statement of Claim, the defendant may justify the words, either with or without the meaning alleged in such innuendo (*Watkin* v. *Hall*, 1868, L.R. 3 Q.B. 396). But the defendant must always make it quite clear in his pleading how much he justifies, and how much he does not (*Fleming* v. *Dollar*, 1889, 23 Q.B.D. 388).

IV

PRIVILEGE

There are occasions on which it is a man's duty to state his real opinion fully and frankly, without thought or fear of consequences. To some of such occasions due regard for the public service or the administration of justice requires that an *absolute* privilege should attach, and a complete immunity be afforded to the writer: no action against him is permitted, even though it be alleged that he knew his words to be false and wrote them with deliberate spite. There are not many such occasions, and the Courts will not increase the number (5 Ex. D. at p. 55). There is, however, a much larger class of occasions on which the privilege is a *qualified* one: occasions on which it is the right or duty of the defendant to state what he honestly believes to be the truth about the plaintiff, but on which the interests of society do not require that he should be freed from *all* responsibility. In such cases the plaintiff will recover damages in spite of the privilege, if he can prove that the defendant did not act in good faith, but was actuated by some improper motive in writing as he did. This improper motive is called *malice*. It is for the defendant to satisfy the judge that the occasion is privileged; when this is done, it is for the plaintiff to prove malice.

Absolute Privilege

1. *Parliamentary Proceedings.*—A petition to Parliament, or to a committee of either House, is absolutely privileged, although it contain false and defamatory

statements. So is all evidence presented to a committee of either House (*Goffin* v. *Donnelly*, 1881, 6 Q.B.D. 307). Parliamentary papers published by the authority of either House are protected by a special statute, the 3 & 4 Vict. c. 9.

2. *Judicial Proceedings.* — No action lies against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceedings before any Court recognised by law. See as to judges, *Anderson* v. *Gorrie*, 1895, 1 Q.B. 668; *Scott* v. *Stansfield*, 1868, L.R. 3 Ex. 220; as to advocates, *Munster* v. *Lamb*, 1883, 11 Q.B.D. 588; *Mackay* v. *Ford*, 1860, 5 H. & N. 792; and as to witnesses, *Seaman* v. *Netherclift*, 1876, 1 C.P.D. 540; 2 C.P.D. 53. But there must be judicial proceedings pending before a competent Court (*Royal Aquarium, etc. Society* v. *Parkinson*, 1892, 1 Q.B. 431).

3. *Acts of State, etc.*—It is not competent to a civil court to entertain a suit in respect of a communication made by one official of state to another in the course of his official duty, or to inquire whether or not he acted maliciously in making it (*Chatterton* v. *Secretary of State for India in Council*, 1895, 2 Q.B. 189). A similar privilege extends to all acts of State, and to the official notification of such acts in the *London Gazette;* to all State papers; and to all advice given to the Crown by its ministers or ambassadors.

Qualified Privilege

"A communication made *bona fide* upon any subject-matter, in which the party communicating has an *interest* or in reference to which he has a *duty*, is privileged, if made to a person having a corresponding *interest* or *duty*." And the word "duty" "cannot be

confined to legal duties, which may be enforced by indictment, action, or *mandamus*, but must include moral and social duties of imperfect obligation" (*per* Lord Campbell, C.J., in *Harrison* v. *Bush*, 1855, 5 E. & B. at pp. 348, 349).

1. *Answers to Confidential Inquiries* are privileged.—"If a person who is thinking of dealing with another in any matter of business asks a question about his character from some one who has means of knowledge, it is for the interests of society that the question should be answered; and the answer is a privileged communication" (*per* Brett, L.J., in *Waller* v. *Loch*, 1881, 7 Q.B.D. 622). The commonest instance of this is the "character" of a servant.

2. *Communications Volunteered.*—There are some cases in which it is the duty of the defendant unasked and of his own accord to give certain information to his friend and neighbour, or even to a stranger, *e.g.* where a confidential relationship already exists between the parties; or where a complaint as to the conduct of some public official is made to his superior officer. The rule in such cases is thus laid down: "Where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he *bona fide* and without malice does tell them, it is a privileged communication" (*per* Blackburn, J., in *Davies* v. *Snead*, 1870, L.R. 5 Q.B. at p. 611). But it is often difficult to apply this rule. Contrast *Coxhead* v. *Richards*, 1846, 2 C.B. 569, with *Bennett* v. *Deacon*, *ib.* 628. And see *Stuart* v. *Bell*, 1891, 2 Q.B. 341.

3. *Communications made in self-defence*, to protect the defendant's private interests or to answer some attack made by the plaintiff, are privileged (*Blackham* v. *Pugh*, 2 C.B. 611; *Laughton* v. *Bishop of Sodor and Man*, 1872,

L.R. 4 P.C. 495). Any one who honestly believes he has a grievance is entitled to seek redress in the proper quarter. But he must apply to a person who has some duty or interest in the matter. It is not sufficient that the defendant honestly believed that such person had jurisdiction (*Hebditch* v. *MacIlwaine*, 1894, 2 Q.B. 54).

4. *Common Interest.*—When two or more persons have a legitimate common interest in any matter, all communications passing between them with reference to that matter are privileged, *e.g.* communications between partners, co-executors or co-trustees, two creditors of the same debtor, two directors of the same company or ratepayers of the same parish (*Spill* v. *Maule*, 1869, L.R. 4 Ex. 232).

V

QUALIFIED PRIVILEGE—*continued*

Privileged Reports

5. *Reports of Judicial Proceedings.*—Every fair and accurate report of any proceeding in a court of law is privileged, unless the Court has itself prohibited the publication, or the subject-matter of the trial be unfit for publication. This is so, even when the proceeding was an *ex parte* application (*Kimber* v. *The Press Association, Limited*, 1893, 1 Q.B. 65). If the case lasts more than one day, reports may be published separately of each day's proceedings, though all comment must be reserved till the trial is over (*Lewis* v. *Levy*, 1858, E. B. & E. 537; 27 L.J. Q.B. 282; *MacDougall* v. *Knight and Son*, 1886, 17 Q.B.D. 636; 1889, 14 App. Cas. 194). The report may be

abridged or condensed. "It is sufficient to publish a fair abstract" (46 L.J. C.P. at p. 406).

6. *Reports of Parliamentary Proceedings.*—So it is now clear law that a fair and accurate report of any proceeding in either House of Parliament is privileged, although it contain matter defamatory of an individual (*Wason* v. *Walter*, 1868, L.R. 4 Q.B. 73).

7. *Reports of the Proceedings of a Public Meeting.*—At common law no other reports were privileged. But, mainly in consequence of a decision of the Court of Appeal in the case of *Purcell* v. *Sowler*, 1877, 2 C.P.D. 215, the following provision was inserted in the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60, s. 2):—

"Any report published in any newspaper of the proceedings of a public meeting shall be privileged, if such meeting was lawfully convened for a lawful purpose and open to the public, and if such report was fair and accurate, and published without malice, and if the publication of the matter complained of was for the public benefit; provided always, that the protection intended to be afforded by this section shall not be available as a defence in any proceeding, if the plaintiff or prosecutor can show that the defendant has refused to insert in the newspaper in which the report containing the matter complained of appeared a reasonable letter or statement of explanation or contradiction by or on behalf of such plaintiff or prosecutor."

It was found, however, that this section did not accomplish the purpose for which it was enacted (see *Pankhurst* v. *Sowler*, 1886, 3 Times L.R. 193). And accordingly in 1888 another Act was passed, the Law of Libel Amendment Act (51 & 52 Vict. c. 64), which

repealed the section set out above, and substituted for it the following provision :—

"§ 4. A fair and accurate report published in any newspaper of the proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above-mentioned bodies, or of any meeting of any commissioners authorised to act by letters patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority, select committees of either House of Parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication at the request of any government office or department, officer of state, commissioner of police, or chief constable, of any notice or report issued by them for the information of the public, shall be privileged, unless it shall be proved that such report or publication was published or made maliciously: Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter: Provided also, that the protection intended to be afforded by this section shall not be available as a defence in any proceedings if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared a reasonable letter or statement by way of contradiction or explanation of such report or other publication, and has refused or neglected to insert the same: Provided further, that nothing in this section contained shall be deemed or construed to limit or abridge any privilege now by law

existing, or to protect the publication of any matter not of public concern and the publication of which is not for the public benefit.

"For the purpose of this section 'public meeting' shall mean any meeting *bona fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted."

Malice

As soon as the judge rules that the occasion is privileged, the plaintiff has to prove malice (but not before). "Malice does not mean malice in law, a term in pleading, but actual malice . . . a wrong feeling in a man's mind. The defendant is not entitled to protection, if he uses the occasion for some indirect and wrong motive" (*Clark* v. *Molyneux*, 1877, 3 Q.B.D. at pp. 246, 247). Malice may be proved by *extrinsic* evidence, showing that there were former disputes or ill-feeling between the parties, or other libels or slanders published by the defendant of the plaintiff. Or it may be proved by *intrinsic* evidence, such as the unwarranted violence of defendant's language or the unnecessary extent given to the publication (*Spill* v. *Maule*, 1869, L.R. 4 Ex. 232).

VI

CRIMINAL LAW

It is a misdemeanour at common law, punishable with fine and imprisonment on indictment (and in

some few cases on a criminal information), to write and publish defamatory words of any living person, or exhibit any picture or effigy defamatory of him, provided the publication of such words, or the exhibition of such picture or effigy, is calculated to cause a breach of the peace. The attempt to publish such words or to exhibit such picture or effigy is also a crime. But it is not a crime merely to speak such words, however maliciously. Read sections 3, 4, and 5 of Lord Campbell's Libel Act (6 & 7 Vict. c. 96).

To publish a libel on a dead man will be a crime, if it tends to provoke his family to a breach of the peace.

A libel on a thing is no crime; and wherever no action would lie without proof of special damage, no indictment or information can be preferred.

Not every publication which would be held a libel in a civil case can be made the foundation of criminal proceedings. See *R.* v. *Labouchere*, 1884, 12 Q.B.D. at p. 322. "Private character should be vindicated in an action for libel, and an indictment for libel is only justified when it affects the public, as an attempt to disturb the public peace" (*Wood* v. *Cox*, 1888, 4 Times L.R. at p. 654).

Publication.—For this reason it is not necessary in a criminal case to prove a publication to a third person: a publication to the prosecutor himself is sufficient, if the words would obviously tend to provoke him to a breach of the peace.

Justification.—For the same reason it is no answer to criminal proceedings for the defendant to prove that his words are true: he must go further and show that it was for the public benefit the words should have been published (6 & 7 Vict. c. 96, s. 6).

Special Protection for Newspapers.—By section 8 of

the Law of Libel Amendment Act, 1888, "no criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein without the order of a Judge at Chambers being first had and obtained. Such application shall be made on notice to the person accused, who shall have an opportunity of being heard against such application." And see sections 4 and 5 of the Newspaper Libel Act, 1881 (44 & 45 Vict. c. 60).

Blasphemous Words.—It is a misdemeanour to speak, or to write and publish, any profane words vilifying or ridiculing God, Jesus Christ, the Holy Ghost, the Old or New Testament, or Christianity in general, with intent to shock and insult believers, or to pervert or mislead the ignorant and unwary. This intent is an essential element in the crime (*per* Lord Coleridge, L.C.J., in *R.* v. *Ramsey and Foote*, 1883, 48 L.T. 739; 15 Cox, C.C. 231).

Obscene Words.—It is a misdemeanour also to publish obscene and immoral books and pictures. By the 20 & 21 Vict. c. 83, justices in certain cases may issue a warrant authorising their officer to search for, seize, and bring before them obscene books and pictures; and then to serve a summons on their owner, on the hearing of which the justices may order such books or pictures to be destroyed. And see the Indecent Advertisements Act, 1889 (52 & 53 Vict. c. 18).

Seditious Words.—It is a misdemeanour to speak or to write and publish any words which tend to bring into hatred or contempt the sovereign, or his ministers, or the government and constitution of the realm, or either House of Parliament, or the Courts of Justice, or to excite his Majesty's subjects to attempt the alteration of any matter in Church or State, otherwise

than by lawful means. But "in a free country like ours," says Lord Kenyon, C.J., in *R.* v. *Reeves*, 1796, Peake, Add. C. 86, "the productions of a political author should not be too hardly dealt with." "The people have a right to discuss any grievances they may have to complain of" (*per* Littledale, J., in *R.* v. *Collins*, 1839, 9 C. & P. 461). "A journalist may canvass and censure the acts of the Government and their policy—and indeed it is his duty" (*per* Fitzgerald, J., in *R.* v. *Sullivan*, 1868, 11 Cox C.C. 54).

Liberty of the Press.—At first the printing-press was regarded with apprehension, and deemed a danger to the State. The king endeavoured to restrict the number of presses and to keep them all in safe hands. Then a Censor was appointed, and no one might print (or, later, publish) a book without his *Imprimatur*. This censorship, in spite of Milton's noble protest—the *Areopagitica*, published on 24th November 1644—was continued till 1695. But since that date no preliminary license is necessary: a man may publish what he will; but he must be prepared to take the consequences, if a jury shall find that what he has published is a libel. "The liberty of the press," says Lord Mansfield, in *R.* v. *Dean of St. Asaph*, 1784, 3 T.R. 431, *n.*, "consists in printing without any previous license, subject to the consequences of law." "A man may publish anything which twelve of his countrymen think is not blamable" (*per* Lord Kenyon in *R.* v. *Cuthell*, 1799, 27 Howell's St. Tr. 675).

Prior to 1792, indeed, this question was deemed one for the judge rather than the jury in a criminal case. The jury found the fact of publication, and then the judge decided whether the words were libellous or not. But Mr. Fox's Act (32 Geo. III. c. 60) put a stop to this, and restored the earlier criminal

law, by which the practice in civil and criminal cases was identical, viz. that the question of libel or no libel was for the jury. The judge should explain to them what a libel is; he may state for their guidance what his own opinion is of the document before him; but the ultimate decision of the matter rests with the jury. Since Fox's Act the English press has been the freest in the world.

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THE END

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